CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 120.

REUBEN M. MANLEY, EXECUTOR OF THE ESTATE OF GEORGE MANLEY, DECEASED, PLAINTIFF IN ERROR,

vs.

RICHARD A. PARK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JUNE 25, 1901.

(18,207.)

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1 In the Supreme Court of the State of Kansas.

Be it remembered, that on the 25th day of June, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition in error and transcript of the record from the district court of Atchison county which petition in error and transcript of the record are in words and figures as follows, to wit:

2-76 REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD C. PARK, Defendant in Error. } No. 11833.

Petition in Error and Transcript of Record.

Feb'y 6, 1901.—Pet. in error, by leave of court, detached and attached to case-made.

H. M. JACKSON,
Att'y — Def't in Error.

Filed Jun- 25 1900.

D. A. VALENTINE,
Clerk Supreme Court.

* * * * * * *

77 And be it further remembered, that on the said 25th day of June, 1900 the same being one of the regular judicial days of the January 1900 term of the supreme court of the State of Kansas, before the Honorable Frank Doster, chief justice, at his chambers in the city of Topeka, the following proceeding was had, and remains of record as follows to wit:

78 *Journal Entry of Stay.*

REUBEN M. MANLEY, Exct. of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error. } 11833.

Now on this 25th day of June A. D. 1900 comes on for hearing the application of the plaintiff in error for an order staying further proceedings in this case in the district court of Atchison county, Kansas, and the court having heard said application it is accordingly ordered that all proceedings for the enforcement of the judgment of the district court of said county in case No. 7833 Richard A. Park *vs.* Wm. H. Risk, executor of the estate of George Manley, deceased, R. M. Manley execu*otr* of said estate substituted defendant be stayed, and said district court proceed no further to enforce said judgment in said cause until the further order of this court, on the plaintiff in error executing with one or more sufficient sureties an undertaking in the sum of five hundred dollars, conditioned as pro-

cedure of 1889, said bond and sureties to be approved by the clerk of this court.

79 And afterwards on the 29th day of June, A. D. 1900 there was filed in the office of the clerk of the supreme court of the State of Kansas a bond for costs, which bond is in words and figures as follows, to wit:

80 In the Supreme Court of Kansas.

REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error.
} Security for Costs.

We, and each of us, enter as security for all costs which may accrue to said defendant, in error, or to the officers of this court herein. And in default of payment by said plaintiffs in error of said costs, and after ten days' notice, we agree that execution may issue against our property for unpaid costs.

REUBEN M. MANLEY,
Executor of the Estate of George Manley, Deceased,
By L. F. BIRD, *His Attorney.*
J. A. SPAULDING.

(Endorsed on back:) No. 11,833. Reuben M. Manley, ex'r, *vs.* Richard A. Park Bond for costs. Approved & filed Jun- 29 1900 D. A. Valentine, clerk supreme court.

This bond is perfectly good.

L. F. BIRD,
Attorney for Plaintiffs in Error.

81 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a bond for stay, which bond for stay with the endorsements thereon is in words and figures as follows, to wit:

82 In the Supreme Court of the State of Kansas.

REUBEN M. MANLEY, Executor of the Estate of George M. Manley, Deceased. Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error.
} No. 11833.

Undertaking to Stay Proceedings.

Know all men by these presents, that we, Reuben M. Manley, executor of the estate of George Manley, deceased, of the county of Union, and State of New Jersey, as principal, and James A. Spalding of the county of Atchison and State of Kansas, as surety, are held and firmly bound unto Richard A. Park, in the full sum of

five hundred dollars ($500.00), to be paid to the said Richard A. Park, his heirs, successors, executors, administrators and assigns, for which payment well and truly to be made, we bind ourselves jointly and severally, and our heirs, successors, and assigns, firmly by these presents, upon the following conditions, to wit:

Whereas, on or about December 13th, A. D. 1897, in a suit pending in the district court of Atchison county, Kansas, between Richard A. Park, plaintiff, and William H. Risk, executor of the estate of George Manley, deceased, defendant, Reuben M. Manley, executor of the estate of George Manley, deceased, substituted defendant, a judgment was rendered against said defendant for the sum of $2463.07, with interest and costs, and whereas on June 2nd, 1900, the said district court of Atchison county, Kansas, refused to vacate and set aside said judgment, and refused to withdraw an execution issued on said judgment, and said defendant in said cause, as plaintiff in error, has duly prosecuted his proceedings in error in the supreme court of the State of Kansas, against the plaintiff in said cause, as defendant in error.

83 And whereas in said action, certain property attached therein, was ordered sold to satisfy said judgment.

Now the conditions of the above obligation is such that if said R. M. Manley, executor of the estate of George Manley, deceased, shall, during the possession of such property by him as plaintiff in error, not commit any waste or suffer any waste to be committed on said property, so attached and ordered sold, and if the said judgment be affirmed by the supreme court, that he will pay the value of the use and occupation of said property so attached and ordered sold, from the date of this undertaking until the delivery of said property pursuant to the judgment, and all costs, then the above obligation to be void, otherwise to remain in full force and effect.

Signed with our hands and dated this June 26th, 1900.

REUBEN M. MANLEY,
Executor of the Estate of George Manley, Deceased,
By L. F. BIRD, *His Attorney.*
JAMES A. SPALDING.

STATE OF KANSAS, } ss:
Atchison County, }

James A. Spalding, of lawful age, on his oath deposes and says that (seal) he is worth the full sum of one thousand dollars over and above all his debts, liabilities and exemptions.

JAMES A. SPALDING.

Subscribed and sworn to before me this 27th day of June, 1900.

G. F. CHAVES,
Notary Public.

My commission expires 28th August 1901.

To clerk:

The surety in this bond, James A. Spalding, is perfectly good and gives First National Bank of Atchison, Kansas as reference.

L. F. BIRD.

Endorsed on back: No. 11,833. Reuben M. Manley, ex. *vs.* Richard A. Park. Undertaking to stay proceedings. Approved. Filed Jun- 29 1900 D. A. Valentine, clerk supreme court.

84 And afterwards on the 8th day of August A. D. 1900 there was filed in the office of the clerk of the supreme court of the State of Kansas a case-made, which case-made with the endorsements thereon is in the words and figures as follows, to wit:

85 11833. Case-made. (Copy.) Filed Aug. 8, 1900 D. A. Valentine, clerk supreme court.

86 In the Supreme Court of the State of Kansas.

REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error.
} No. —.

Petition in Error.

Filed Jun- 25, 1900. D. A. Valentine, clerk supreme court.

Comes now here the said plaintiff in error, Reuben M. Manley, executor of the estate of George Manley, deceased, and for his petition in error herein, against the said defendant in error, Richard A. Park, alleges; that heretofore and on, to wit: December 13th, 1897, the said defendant in error, as plaintiff below, recovered a judgment against the said plaintiff in error, defendant below, and order of sale on said judgment, for the sale of certain real property attached in said action as the property of the plaintiff in error, defendant below. That afterwards on June 2nd, 1900, the said district court of Atchison county, Kansas, refused to vacate or set aside said judgment and refused to order returned the order of sale issued on said judgment, and a full case-made of the proceedings of said district court is hereto attached and marked "Exhibit A."

And plaintiff in error alleges that there was error in the proceedings in the said district court of Atchison county, Kansas, in this, to wit:

First. That said district court erred in rendering judgment in favor of said defendant in error, plaintiff below, and against the said plaintiff in error, defendant below, for the sum of twenty-four hundred and sixty-three and seven one-hundredths dollars ($2463.07), with interest and costs of suit (case-made p. 38).

87 Second. That said district court erred in ordering the property attached in said action to be sold to pay said judgment (case-made pp. 38–39).

Third. That said district court erred in overruling the motion of plaintiff in error, defendant below, to vacate and set aside said judgment (case-made pp. 47 to 49).

Fourth. That said district court erred in overruling the motion

of plaintiff in error, defendant below, to withdraw the execution issued on said judgment. (case-madep p. 50 to 52.)

And said plaintiff in error asks that this honorable court examine into the doings and proceedings of the said district court of Atchison county, Kansas and reverse the same and order the said judgment set aside and vacated, and make such further order herein as plaintiff in error may be entitled to.

DAVID MARTIN AND
L. F. BIRD,
Attorneys for Plaintiff in Error.

88 (Copy.)

EXHIBIT A.

In the District Court of Atchison County, Kansas.

EXHIBIT A.

RICHARD A. PARK, Plaintiff,
vs.
WM. H. RISK, Executor of the Estate of George Manley, Deceased; R. M. Manley, Executor of said Estate, Substituted Defendant, Defendant.

Case-made.

Pleas before the honorable the district court of Atchison county, Kansas.

Be it remembered that heretofore and on, to wit: November, 4, 1895, Richard A. *Risk*, plaintiff, commenced his action in the district court of Atchison county, Kansas, against William H. Risk, executor of the estate of George Manley, deceased, defendant, by filing his petition, affidavit for attachment and precipe for summons and order of attachment, and which are in the words and figures following to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased, Defendant.

Petition.

Plaintiff for his cause of action herein says:

1. That George Manley deceased at the county of Union in the State of New Jersey on or about the 30th day of December, 1891, being at the time of his death a resident and citizen of said county and State.

That at the time of his death the said George Manley, now de-

ceased was the owner and holder of shares of stock of the Kansas Trust and Banking Company, amounting to the sum of twenty-
89 seven thousand, five hundred ($27,500.00) dollars.

That the said George Manley died testate having made, published and acknowledged his will and testament and codicile thereto, therein and thereby designating and naming Reuben M. Manley and William H. Risk as executors of and trustees under said last will and testament.

That on or about the 22nd day of January, 1892, said will and codicile were duly admitted to probate in the orphans' court in and for said county of Union and State of New Jersey and letters testamentary were issued to William H. Risk, one of the said executors and trustees and thereon and on the said day William H. Risk duly accepted such trust and qualified as such executor and trustee and thereon and thereby said William H. Risk, as such executor of said estate became seized and possessed of all the property of the late George Manley, now deceased lying and being situate in the State of Kansas.

That in all proceedings in said orphans' court and in the office of the surrogate of the county of Union in the probate of said will and codicile, and the granting of letters testamentary thereon, the said orphans' court and the surrogate thereof were duly and legally authorized and empowered to take proof of the execution of said will and to make order of probate thereof and grant letters testamentary to said William H. Risk as such executor.

That under and by virtue of such ownership of such shares of stock by said George Manley and the making of said will and the probate thereof and the appointment of William H. Risk executor of the estate of George Manley deceased, said defendant William H. Risk, executor of the -state of George Manley deceased, became and is a stockholder of the said Kansas Trust and Banking Company, a corporation organized and incorporated under the laws of the State of Kansas other than for railroad, religious or charitable purposes, and as such executor of said estate is the owner and holder of shares of stock of said corporation amounting to the sum of twenty-
90 seven thousand five hundred ($27,500.00) dol-ars, and the plaintiff says that the said corporation is wholly insolvent and has no means or property out of or from which said indebtedness so due to the plaintiff as creditor, can be collected.

2. Plaintiff further says that on the 15th day of August, 1890 the Kansas Trust and Banking Company, a corporation duly incorporated and organized under the laws of the State of Kansas became and was indebted to one, Richard Berrill, in the sum of four hundred dollars which the said corporation promi*n*sed and agreed to pay on 15th day of August, 1895, by its certain debenture bond, and concurrently therewith promised and agreed to pay 7 % interest per annum thereon, payable semi-annually, upon said sum, b*u* its certain interest coupons attached to said bond; that said corporation paid the interest upon said bond up to and including the 15th day of February, 1893 and th*a* said bond with interest thereon from February 15th, 1893, is wholly due and unpaid, except the

n of $20.00, paid thereon on the 22nd day of March, 1894, and the ther sum of ($20.00) twenty dol-ars paid thereon on the 5th day September, 1895, which bond was by said — duly assigned and nsferred to the plaintiff on the 15th day of October, 1895, a copy which bond and of one of said coupons and of the assignment reof, is hereto attached, *am*rked "Exhibit A" and made a part reof.

And further plaintiff says that he is the owner and holder of said nd and that he is a credotor of said The Kansas Trust and Bank- g Company, a corporation, to the extent and amount of said bond s the payment thereon being the sum of four hundred dollars, with erest at the rate of 7 *% per cent.* per annum thereon, from Feb'y th 1893, less the two said credits of twenty dollars. ($20.00) each, dorsed thereon.

Plaintiff further says that said corproation has suspended business more than one year prior to the filing of this petition and has not ice or during that time en*a*ged in the transaction of any business, natever.

3. Plaintiff for a further cause of action herein says, that he here adopts the count of clause hereof numbered "1" as fully and in all respects as if copied and set out herein as a part reof, and further says:

That on the 15th day of July, 1892, the Kansas Trust and Bank- g Company, a corporation duly incorporated and organized under e laws of the State of Kansas, was indebted to one, Adelaide C. ark in the sum of six hundred dollars, which said corporation by s bond and interest coupons thereto attached promised and agree- pay, together with interest upon said principal sum at the rate of per cent. per annum: that said corporation paid the interest upon id bond up to and including the 15th day of January 1893 and at said bond and all interest thereon is wholly due and unpaid, xcept there has been paid upon said bond, payments as follows, to it: on March 22nd, 1894, the sum of $30.00 *dollars*, and on Sep- mber 5th, 1895 the sum of 30.00 dollars.

That on the 15th day of October 1895 the said Adelaide C. Park old, assigned and transferred to this plaintiff the said bond, by in- orsement in writing thereon, of which bond and of one of the un- aid coupons and said assignment a copy is hereto attached marked Exhibit B" and — a part hereof.

Plaintiff further says that to the extent and amount so due upon aid bond, he is a creditor of said corporation, and that said corpo- ation has for more than one year next before the filing of this pe- ition suspended business and ceased for and during that time to ransact any business whatever, and said corporation is wholly in- olvent and has no means or property out of or from which said ndebtedness can be collected by the plaintiff as a creditor of said orporation.

That under and by virtue of such ownership of said shares of tock by said George Manley and the making of said will and the robate thereof and the appointment of William H. Risk, executor f the estate of George Manley, deceased, said defendant Wil-

92 liam H. Risk, executor of the estate of George Manley, deceased is a stockholder of said corporation and as such executor of said estate is the owner and holder of stock of said corporation amounting to the sum of twenty-seven thousand five hundred ($27,500.00) dollars, and the plaintiff says that said corporation is wholly insolvent and has no means or property out of or from which said indebtedness so due to the plaintiff as such creditor can be collected.

Plaintiff for a further cause of action says that he here adopts the count or clause hereof numbered "1" as fully and in all respects as if the same were copied and set out herein, as a part hereof, and further says,

That on the 16th day of September 1889 the Kansas Trust and Banking Company, a corporation duly incorporated and organized under the laws of the State of Kansas, was indebted to this plaintiff R. A. Park in the sum of seven hundred dollars, which said corporation by its certain bond and interest coupons thereto attached, promised to pay together with interest upon said principal sum at the rate of 7 per cent. per annum. That said corporation paid the interest upon said bond up to and including the 15th day of September, 1892 and that said bond and all interest thereon is wholly due and unpaid, except that there has been paid upon said bond, payments as follows, to wit: On March 22nd, 1894, the sum of $35.00 *dollars* and on September 5th, 1895, the sum of 35.00 dollars. A copy of which bond and of one of said coupons, is hereto attached marked "Exhibit C" and made a part thereof.

Plaintiff further says that to the extent and the amount so due upon said bond he is a creditor of said corporation, and that said corporation has for more than one *than one* year next before the filing of this petition suspended business and ceased for and during that time to transact any business whatever, and said corporation is wholly insolvent and has no means or property out of which said indebtedness can be collected by this plaintiff as such creditor of said corporation.

That under and by virtue of such ownership of said shares of stock by the said George Manley and the making of said will and the probate thereof and the appointment of William H. Risk,
93 executor of the estate of George Manley, deceased, said defendant William H. Risk, executor of the estate of George Manley, deceased is a stockholder of said corporation and as such executor of said estate is the owner and holder of stock of said corporation amounting to the sum of twenty-seven thousand, five hundred ($27,500.00) dollars, and plaintiff says that said corporation is wholly insolvent and has no means or property out of or from which said indebtedness so due to the plaintiff as such creditor can be collected.

5. Plaintiff for a further cause of action herein says that he here adopts the count and clause hereof numbered "1" as fully and in all respects as as if the same were copied and set out herein, as a part hereof, and further says—

That on the 16th dau of September 1889 the Kansas Trust and

Banking Company, a corporation duly incorporated and organized under the laws of the State of Kansas, was indebted to this plaintiff R. A. Park in the sum of three hundred dollars which said corporation by its bond and interest coupons thereto attached promised and agreed to pay, together with interest upon said principal sum at the rate of 7 per cent. per annum.

That said corporation paid the interest upon said bond up to and including the 15th day of September, 1892, and that said bond and all interests thereon *is* wholly due and unpaid, except that there *has* been paid upon said bond, payments as follows, to wit—$15.00 *dollars* paid March 22nd, 1895, and the further sum of $15.00 paid September 5th, 1895, a copy of which bond and of one of the said coupons is hereto attached marked "Exhibit D" and made a part thereof.

Plaintiff further says that to the extent and amount so due upon said bond he is a creditor of said corporation, and that said corporation has for more than one year next before the filing of this petition suspended business and ceased for and during that time to transact any business whatever, and said corporation is wholly insolvent and has no means or property out of or from which said indebtedness can be collected by this plaintiff as such creditor of said corporation.

94 That under and by virtue of such ownership of said shares of stock by said George Manley and the making of said will and the probate thereof and the appointment of William H. Risk, executor of the -state of George Manley, deceased, said defendant William H. Risk, executor of the estate of George Manley, deceased, is a stockholder of such corporation and as such executor of said estate is the owner and holder of stock of said corporation amounting to the sum of twenty-seven thousand fi*b*e hundred ($27,500.00) dollars, and the plaintiff says that said corporation is wholly insolvent and has no means or property out of or from which said indebtedness so due to this plaintiff as such creditor, can be collected.

Wherefore, plaintiff prays judgment against the said defendant for the sum of two thousand ($2,000.00) — with 7 per cent. interest per annum from Sept. 15th, 1892, on $1000.00 and from February 15th, 1893 on $400.00 and on $600.00 from January 15th, 1893, less payments thereon as follows, to wit $10000 (in payments) paid March 22nd, 1894, and $100.00 (in payments) paid September 5th, 1895 and also for costs of suit in this behalf laid out and expended.

(Signed) JACKSON & JACKSON,
Attorneys for the Plaintiff.

Precipe.

Clerk:

Please issue summons and order of attachment in the above-entitled cause, endorsed, action for the recovery of money, amount claimed, $2000.00 with 7 per cent. interest per annum from September 15th, 1892 on $1000. and on $400.00 from February 15th, 1893

and on $600.00 from January 15th, 1893 subject to credits as follows, $100. in payments of date March 22nd, 1894, and $100.00 in payments of date September 5th, 1895, and costs of suit not to exceed fifty ($50.00) —.

(Signed) JACKSON & JACKSON,
Attorneys for Plaintiff.

95 Number 259.

I, J. L. Coplan, cashier of the First National Bank of Atchison, Kansas hereby certify that as security for the due payment of the debenture bond of the Kansas Trust and Banking Company of Atchison, Kansas, hereto attached, there are deposited in this bank mortgages on real estate equal in amount to the amount of said bond. Said mortgages are not to be removed from the custody of this bank until the said bond is paid and evidence of such payment is furnished to said bank: Except on the condition that the said The Kansas Trust and Banking Company shall deposit in place thereof other mortgages equal in amount to those removed, or cash, at the option of the said The Kansas Trust and Banking Company.

In witness whereof I have hereunto set my hand as such cashier, this 15th day of August, 1890.

(Signed) J. L. COPLAN, *Cashier.*

EXHIBIT "A."

The Kansas Banking and Trust Company of Atchison, Kansas for value received is indebted unto the registered holder hereof, if registered otherwise to Richard Berrill in the sum of four hundred dollars which shall be due on the 15th day of August, 1895.

This bond draws interest at the rate of seven per cent. per annum payable semi-annually according to the interest coupons hereto attached. Principal and interest are payable at maturity at the office of the Kansas Trust and Banking Company in Atchison, Kansas. This bond is secured by mortgages on real estate deposited with the First National Bank of Atchison, Kansas, in trust in accordance with the certificate of said bank hereto attached and without which certificate this bond is not valid.

In witnes- whereof the corporate seal of the Kansas Trust and Banking Company of Atchison, Kansas has been hereto attached this 15th day of August, 1890, and this bond has been signed by E. G. Armsby, secretary of,

THE KANSAS TRUST AND BANKING COMPANY.

96 $14.00. Fourteen dollars will be paid to Richard Berrill or bearer on the 15th day of August, 1893 on presentation hereof at the office of the Kansas Trust and Banking Company in Atchison, Kansas.

This coupon is for six months' interest on debenture bond N-. 259. issued by the said The Kansas Trust and Banking Company.

(Signed) E. C. ARMSBY, *Sec'y.*

Number 348.

I, S. A. Frazier, cashier of the First National Bank of Atchison, Kansas, hereby certify that as security for the due payment of the debenture bond of the Kansas Trust and Banking Company of Atchison Kansas, hereto attached, there are deposited in this bank mortgages on real estate equal in amount to the amount of said bond. Said mortgages are not to be removed from the custody of this bank until the said bond is paid and evidence of such payment is furnished to said bank: Except on the condition that the said The Kansas Trust and Banking Company shall deposit in place thereof other mortgages equal in amount to those removed, or cash, at the option of the said The Kansas Trust and Banking Company.

In witness whereof I have hereunto set my hand as such cashier, this 15th, day of July, 1892.

(Signed) S. A. FRAZIER, *Cashier.*

The Kansas Trust and Banking Company of Atchison Kansas, for value received is indebted unto the registered holder hereof, if registered, otherwise to Adelaide C. Park, in the sum of six hundred dollars which shall be due on the 15th day of July, 1895.

This bond draws interest at the rate of seven per cent. per annum payable semi-annually according to the interest coupons hereto attached. Principal and interest are payable at maturity at
97 the office of the Kansas Trust and Banking Company in Atchison, Kansas.

This bond is secured by mortgages on real estate deposited with the First National Bank of Atchison, Kansas, in trust in accordance with the certificate of said bank hereto attached and without which certificate this bond is not valid.

In witness whereof, the corporate seal of the Kansas Trust and Banking Company of Atchison, Kansas has been hereto attached on this 15th day of July, 1892, and this bond has been signed by

E. G. ARMSBY,

Secretary of the Kansas Trust and Banking Company.

$21.00. Twenty-one dollars will be paid to Adelia C. Park, or bearer on the 15th day of July 1893, on presentation hereof at the office of the Kansas Trust and Banking Company, in Atchison, Kansas. This coupon is for six months' interest on debenture bond No. 348, issued by the said The Kansas Trust and Banking Company.

(Signed) ADELIADE C. PARK.

Number 100.

I, S. A. Frazier, ass't cashier of the First National Bank of Atchison, Kansas hereby certify that as security for the due payment of the debenture bond of the Kansas Trust and Banking Company of Atchison, Kansas, hereto attached, there are deposited in this bank mortgages on real estate equal in amount to the amount of said bond. Said mortgages are not to be removed from the custody of this bank until the said bond is paid and evidence of such payment

is furnished to said bank: Except on the condition that the
98 said The Kansas Trust and Banking Company shall deposit in place thereof other mortgages equal in amount to those removed, or cash, at the option of said The Kansas Trust and Banking Company.

In witness whereof I have hereunto set my hand as such assistant cashier, this sixteenth day of September, 1889.

(Signed) S. A. FRAZIER,
Ass't Cashier.

The Kansas Trust and Banking Company of Atchison, Kansas for value received is indebted unto the registered holder hereof, if registered, otherwise to R. A. Park, in the sum of seven hundred dollars, which shall be due on the 15th day of September, 1894.

This bond draws interest at the rate of — per cent. per annum payable semi-annually according to the interest coupons hereto attached. Principal and interest are payable at maturity at the office of the Kansas Trust and Banking Company in Atchison Kansas. This bond is secured by mortgages on real estate deposited with the First National Bank of Atchison Kansas, in trust in accordance with the certificate of said bank hereto attached without which certificate this bond is not valid.

In witness whereof the corporate seal of the Kansas Trust and Banking Company of Atchison, Kansas has been hereto attached this 16th day of September 1889, and this bond has been signed by E. G. Armsby, sec'y of

THE KANSAS TRUST AND BANKING COMPANY.

$24.50. Twenty-four and fifty one-hundredths dollars will be paid to R. A. Park, or bearer on the fifteenth day of March, 1893 on presentation hereof at the office of the Kansas Trust and Banking Company, in Atchison, Kansas. This coupon is for six months' interest on debenture bond No. 188 issued by the said The Kansas Trust and Banking Company.

(Signed) E. G. ARMSBY, *Sec'y.*

99 Number 190.

I, S. A. Frazier, assistant cashier of the First National Bank of Atchison, Kansas hereby certify that as security for the due payment of the debenture bond of the Kansas Trust and Banking Company of Atchison, Kansas, hereto attached, there are deposited in this bank mortgages on real estate equal in amount to the amount of the said bond. Said mortgages are not to be removed from the custody of this bank until the said bond is paid and evidence of such payment is furnished to said bank: Except on the condition that the said The Kansas Trust and Banking Company shall deposit in place thereof other mortgages equal in amount to those removed, or cash, at the option of said The Kansas Trust and Banking Company.

In witness whereof I have hereunto set my hand as such assistant cashier this sixteenth day of September, 1889.

(Signed) S. A. FRAZIER,
Ass't Cashier.

The Kansas Trust and Banking Company of Atchison, Kansas for value received is indebted unto the registered holder hereof, if registered otherwise to R. A. Park, in the sum of three hundred dollars, which shall be due on the fifteenth day of September, 1894.

This bond draws interest at the rate of seven per cent. per annum payable semi-annually according to the interest coupons hereto attached. Principal and interest are payable at maturity at the office of the Kansas Trust and Banking Company in Atchison, Kansas. This bond is secured by mortgages on real estate deposited with the First National Bank of Atchison, Kansas in trust in accordance with the certificate of said bank hereto attached without which certificate this bond is not valid.

In witness whereof the corporate seal of the Kansas Trust and Banking Company of Atchison Kansas, has been hereto attached this sixteenth day of September, 1889 and this bond has been signed by E. G. Armsby, secretary of

THE KANSAS TRUST AND BANKING COMPANY.

100 $10.50. Ten and fifty one-hundredths dollars will be paid to R. A. Park or bearer on the fifteenth day of March, 1893 on presentation hereof at the office of the Kansas Trust and Banking Company in Atchison Kansas. This coupon is for six months' interest on debenture bond No. 190—issued by the said The Kansas Trust and Banking Company.

(Signed) E. G. ARMSBY, *Sec'y.*

(EXHIBIT "B.")

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased.

Affidavit for Attachment.

STATE OF KANSAS, } ss:
Atchison County, }

Richard A. Park, being duly sworn upon his oath says that he is the plaintiff in the above-entitled action: that he is about to commence the above-entitled action in said court and against the said defendant for the recovery of two thousand ($2000) dollars with seven (7) per cent. interest per annum upon one thousand ($100–) — thereof from September 15th, 1892 and with 7 per cent. interest upon

four hundred ($400) dollars thereof from February 15th, 1893 and with 7 per cent. interest per annum upon six hundred ($600) dollars thereof from January 15th, 1893 less one hundred ($100.00) dollars, paid March 22nd, 1894 and one hundred ($100) dollars, paid September 5th, 1895: that said defendant is justly indebted to plaintiff in said sum and interest less said credits, upon the liability of said defendant as a stockholder and owner of stock to the extent and amount of twenty-seven thousand, five hundred ($27,500.00) dollars in the Kansas Trust and Banking Company, a cor-
101 poration, now insolvent and for more than one year last past dissolved and not engaged in business and which corporation is indebted to the plaintiff Richard A. Park, on account of four certain bonds described as follows; one bond dated September 16th, 1889, for seven hundred ($700) —, one bond dated September 16th, 1889, for three hundred ($300) dollars, both payable to the plaintiff, interest upon which two bonds has been paid to September 15th, 1892.

One bond dated *dated* August 15th, 1890, for four hundred ($400) dollars, payable to Richard Berrill, and assigned to plaintiff, interest paid to February 15th, 1893. One bond dated July 15th, 1892, for six hundred ($600) dollars, interest upon which is paid to January 15th, 1893, payable to Adelia C. Park, and assigned to plaintiff.

The first three of said bonds being due and payable five years after date, and the fourth of said bonds being due and payable three years after date, all said bonds bearing seven (7) per cent. interest per annum, and the last two of said bonds duly sold, assigned and transferred to the plaintiff, with a credit upon said first-mentioned bond of twenty ($35.00) dollars, and upon the second of said bonds a credit of fifteen ($15.00) dollars; upon the third-mentioned bond of twenty ($20.00) dollars, and upon the fourth-mentioned bond of thirty ($30.00) dollars, all which credits and payments were made March 22nd, 1894: And with further credits upon said first-mentioned bond of thirty-five ($35.00) dollars: upon said second-mentioned bond of fifteen (15) dollars, upon said third-mentioned bond of twenty ($20.00) dollars and upon said fourth-mentioned bond of thirty ($30) dollars, which last-mentioned payments and credits were made September 5th, 1895; that said claim is just, is due and is wholly unpaid.

That affiant believes that he as such plaintiff ought to recover of said defendant in said action said sum of two thousand ($2000) dollars, with interest upon one thousand ($1,000) dollars thereof, being upon said first-two-mentioned bonds from September 15th, 1892 and with interest upon four hundred ($400.00) dollars from February 15th, 1893 and with interest upon six hundred ($600.00) dollars thereof, from January 15th, 1893, said interest being com-
102 puted at seven (7) per cent. per annum, less said two credits upon each of said bonds, being in the aggregate two hundred ($200.00) dollars.

That said defendant is a non-resident of the State of Kansas; and that said claim and demand about to be sued for in the above-entitled

action is a debt and demand upon contract and arose wholly within the limits of the State of Kansas.

And further affiant saith not.

RICHARD A. PARK.

Subscribed in my presence and sworn to before me this 4th day of November, 1895,

In witness whereof I have hereunto subscribed my name and seal at Atchison, Kansas, the day and year last above written.

(Signed) J. N. COX,
Clerk of Dist. Court.

Endorsed on the back: R. A. Park *vs.* Wm. H. Risk, executor of the estate of George Manley. Petition and affidavit for attachment, Filed Nov. 4, 1895, J. N. Cox, clerk.

103 Thereafter and on to wit: November 4, 1895, summons was issued in said cause, directed to the sheriff of Atchison county, Kansas for execution and return, and was by said sheriff returned "*mon est*" on November, 8, 1895, and said summons is in the words and figures following to wit:

THE STATE OF KANSAS, } *ss*:
County of Atchison, }

To the sheriff of said county of Atchison, Greeting:

You are hereby commanded to notify William H. Risk, executor of the estate of George Manley deceased, that he has been sued by Richard A. Park, in the district court within and for said county of Atchison and that unless he answer by the 4th, day of December, A. D. 1895, the petition of said Richard A. Park, filed against said William H. Risk, executor of the estate of George Manley deceased, in the cl-rk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on or before the 14th, day of November, A. D. 1895.

Witness my hand and seal of said court at the city of Atchison, this 14th day of November, A. D. 1895.

(Signed) J. N. COX, *Clerk.*

Suit brought for the recovery of money. Amount *cal*imed, $2000.00 with interest at 7 per cent. per annum thereon, and upon $400.00 thereof, from Feb'y 15th, 1893 and upon $600. thereof from January 15th, 1893, and upon $1000.00 thereof, from Sept. 15, 1892 less credits of $100.00 of March 22nd, 1894 and $100.00 of September, 5th, 1895, with interest from the — day of —— A. D. 189–, at the rate of — per cent. per —.

(Signed) JACKSON & JACKSON,
Attorney-for Plaintiff.

104 And was endorsed on the back as follows, to wit:—
No. 7833, docket 14, page 40. Summons, Richard A. Park

vs. Wm. H. Risk, ex. etc., issued Nov. 4, A. D. 1895. Returnable Nov. 14, A. D. 1895. Filed Nov. 8, 1895, J. N. Cox, clerk, Jackson & Jackson, attorneys for plaintiff.

And the return of the sheriff endorsed thereon is as follows, to wit:

"Officer's Return."

I received this summons on the 4th day of November, 1895, at ten (10) o'clock a. m., and said William H. Risk, executor of the estate of George Manley deceased, not found in my county, this 8th, day of November, 1895.

(Signed) M. E. LARKIN,
Sheriff of Atchison County.

Thereafter and on to wit: November, 4, 1895, and order of attachment was issued in said cause, directed to the sheriff of Atchison county, Kansas, for execution and return, and was by said sheriff returned on November, 8, 1895, and said order of attachment is in the words and figures following, to wit:

Order of Attachment.

UNITED STATES OF AMERICA, }
State of Kansas, County of Atchison, } ss:

To the sheriff of said county, Greeting:

Whereas: Richard A. Park, plaintiff has this day, on the necessary affidavit being filed, obtained an order of attachment against William H. Risk, executor of the estate of George Manley deceased,

Defendant in a certain action now pending in the district court within and for said county of Atchison, wherein the said Richard A. Park is plaintiff, and the said William H. Risk, executor of the estate of George Manley deceased is, defendant to recover of the said defendant the sum of two thousand dollars with 7 % interest per annum thereon, but upon $400.00 thereof from Feb'y, 15th, 1893, and upon $600.00 thereof from January 15th, 1893, and upon $100.00 thereof from September 15th, 1892, less a credit of $100.00 paid March 22nd, 1894, and a credit for $100.00 paid Sept., 5th, 1895.

105

Now therefore, this is to command you to attach the lands, tenements, goods, chattles, stocks, and interest in stocks, rights, credits, moneys, and effects of the said William H. Risk, executor of the estate of George Manley, deceased, in your county, not exempt by law from being applied to the plaintiff's claim or so much thereof, as will satisfy the said plaintiff's said claim as above stated, and the probate cost of this suit not exceeding fifty (50) dollars, and of this order and your proceedings thereon, do you make due return on the 14th day of November, A. D. 1895.

Witness my hand and seal of said court, at my office in the city of Atchison, Kansas, this 4th day of November, A. D. 1895.

[L. S.] (Signed) J. N. COX, *Clerk.*

And said order of attachment was endorsed on the back as follows to wit: No. 7833, Order of at-chment, Richard A. Park, *vs.* Wm. H. Risk, ex., etc., issued Nov. 4, A. D. 1895, Returnable Nov. 14, A. D. 1895. Filed Nov. 8th, 1895, J. N. Cox, clerk, Jackson & Jackson, attorney- for plaintiff.

And the return of the sheriff on said order of attachment is in the words and figures following, to wit:

Attachment Return on Real Estate.

I received the within, and hereto annexed order of attachment on the 4th day of November, A. D. 1895, at ten (10) o'clock a. m. of that day executed the same in my county of Atchison,
106 State of Kansas, on the 4th day of November, A. D. 1895, at 2.45 p. m. of that day by attaching the following-described real property, lying and being in said Atchison county, State of Kansas, as the property of said defendant, William H. Risk, executor of the estate of George Manley deceased to wit:

The northeast ¼ of section twenty-five (25), township five (5) of range twenty (20), subject to a former levy and appraisement, under attachment in case No. 7832 in favor of Richard A. Park, by going to said property and there declaring that by virtue of said order of attachment, I attached the said property at the suit of the plaintiff, and by leaving in the most conspicuous place, upon said attached property a true and certified copy of said order of attachment, there being no occupant upon said property, of the within on this 4th day of November, A. D. 1895.

(Signed) M. E. LARKIN, *Sheriff.*

Thereafter and on to wit: November 25, 1895, affidavit for publication was filed in said cause, and same is in the words and figures following, to wit:

In the District Court of Atchison County, Kansas.

R. A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased, Defendant. } No. 7833.

STATE OF KANSAS, } *ss:*
Atchison County, }

H. M. Jackson being duly sworn upon his oath says that he is one of the plaintiff's attorneys in the above-entitled cause: that the defendant is a non-resident of the State of Kansas and that personal service of summons cannot be made upon said defendant
107 within the State of Kansas, and that plaintiff with due diligence is unable to make personal service of summons upon said defendant within the State of Kansas.

That said action is brought against a non-resident of the State of

Kansas, having in this State property sought to be taken by attachment and to *eb* appropriated for the payment of the indebtedness due from defendant to plaintiff.

(Signed) H. M. JACKSON.

Subscribed and sworn to before me this 25th day of November, 1895.

[L. S.] In witness whereof I have hereto subscribed my name and affixed my notarial seal at Atchison Kansas, the day and year last above written.

(Signed) Z. E. JACKSON,
Notary Public.

My commission expires Dec. 29th, 1898.

Endorsed on the back: No. 7833. *E* R. A. Park *vs.* William H. Risk, executor of the estate of Geo. Manley, deceased. Affidavit for publication of notice. Filed Nov. 25th, 1895, J. N. Cox, clerk.

Thereafter and on to wit: February, 3, 1896, proof of publication was filed in said court and cause, and same is in the words and figures following, to wit:

Proof of Publication of Notice.

Notice.

To William H. Risk, executor of the estate of George Manley, deceased:

You are hereby notified that R. A. Park as plaintiff, has filed his petition in the district court of Atchison county, State of Kansas, against you as defendant and that you, William H. Risk executor of the estate of George Manley, deceased, have been sued and must answer the petition filed by said R. A. Park, as plaintiff, on or before the 14th day of January, 1896, or the petition will be taken as true and judgment, for the sum of two thousand dollars with interest thereon at 7 per cent. per annum from the 15th day of Feb-
108 ruary, 1893, less one credit of ($100.00) *dollars* made March 22nd, 1894, and one credit of ($100.00) *dollars* made September 5th, 1895, and an order of sale of the following-described property attached in said cause, to wit:

The northeast quarter of section twenty-five (25) township five (5) of range twenty (20) lying and being situate in Atchison county State of Kansas, will be rendered accordingly.

R. A. PARK, *Plaintiff,*
By JACKSON & JACKSON, *Attorneys.*

(7833) 11 30 23t.

STATE OF KANSAS, }
County of Atchison, } *ss:*

W. T. Snider being duly sworn upon oath states that he *si* chief clerk of the Daily Champion, a daily newspaper, printed and pub-

lished in said Atchison county, and of general circulation therein, and which has been so printed and published in said Atchison county continuously and uninterruptedly for a period of fifty-two consecutive weeks last preceding the date of the first publication of the annexed notice; that the notice, a true copy of which is hereto annexed, and made a part hereof, was published in said daily newspaper for 23 consecutive issues, the first publication thereof being on the 14th day of January A. D. 1896, and in each and every issue of said weekly newspaper between those dates, both inclusive.

(Signed) W. T. SNIDER.

[L. S.] Subscribed in my presence, and sworn to before me, this 24th day of Jan'y, A. D. 1896.

(Signed) R. B. DRURY,
Notary Public.

My term expires March 5th, 1899.

109 Endorsed on the back: No. 7833. R. A. Park *vs.* Wm. H. Risk, executor etc., Proof of publication of notice. Filed Feb. 3, 1896. J. N. Cox, clerk.

110 Thereafter and on to wit January 14, 1896, the defendant filed a demur-er in said cause, and same is in the words and figures following, to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased, Defendant. } No. 7833.

Dem-rrer.

Defendant, William H. Risk, executor of the estate of George Manley, deceased, here now files this his demurrer to the petition of the plaintiff, heretofore filed in the above-entitled cause for that it appears upon the face of the said petition;

1st. That the court has no jurisdiction of the person of the defendant, or the subject of the action.

2nd. That several causes of action are improperly joined.

3rd. That the petition does not state facts sufficient to constitute a cause of action.

(Signed) BUCKNER, BIRD & LAKE,
Attorneys for Defendant.

Endorsed on the back: No. 7833. Richard A. Park, plaintiff, *vs.* Wm. H. Risk, executor, defendant. Demurrer, Filed Jan. 14, 1896, J. N. Cox, clerk.

111 Thereafter and on, to wit: March 29, 1897, plaintiff filed motion to continue cause against R. M. Manley, as executor, and the same is in the words and figures following, to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased, Defendant.

Motion for order to continue said cause against R. M. Manley, as executor of the estate of George Manley, deceased, as successor of William H. Risk, as such executor.

Comes now the said plaintiff and suggests to the court that William H. Risk, executor of the estate of George Manley deceased, on or about the 23rd, day of January, A. D. 1897 resigned and surrendered his trust as such executor and trustee of said estate and there-on R. M. Manley was appointed and duly qualified as executor and trustee of said estate of George Manley deceased, which resignation, surrender, order of appointment were each and all made by the orphans' court of Union county of the State of New Jersey, of which county said George Manley was a resident at the time of his decease, and in which court the will of said George Manley was duly probated, and which court had jurisdiction to receive and accept the resignation of said William H. Risk as such executor and trustee and to appoint the said R. M. Manley as executor and trustee of said estate; and there-on said R. M. Manley duly qualified as such executor and trustee, and the right of action in favor of the plaintiff and against the said R. M. Manley as executor and trustee and as successor of said William H. Risk as such executor and trustee of said estate —.

Wherefore, plaintiff prays that said action proceed in the name of and against said R. M. Manley, as executor and trustee of
112 the estate of George Manley, deceased, as the successor of said William H. Risk, the executor and trustee of said estate.

(Signed) JACKSON & JACKSON,
Attorneys for Plaintiff.

Endorsed on the back: No. 7833. R. A. Park, *vs.* Wm. H. Risk, executor, etc. Motion to continue cause against R. M. Manley. Filed March, 29, 1897, J. N. Cox, clerk.

Thereafter and on to wit: March 29, 1897, the court made an order in said cause continuing the same against R. M. Manley, as executor, which was duly entered of record in the journals of said court in Journal 28, page 62, and is in the words and figures following to wit:

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased, Defendant.

Order.

Now on this 29th, day of March A. D. 1897 comes the above-named plaintiff and suggest- to the court that William H. Risk as executor of the estate of George Manley, deceased, on January 23rd, 1897 resigned his trust as such and that his powers as such executor and trustee have ceased and the- R. M. Manley has been duly appointed and qualified as executor and trustee of the estate of George Manley, deceased, and as such has succeeded to the rights, interests and authority of said William H. Risk as such executor, and moves the court to order and direct that said cause proceed in the name of said R. M. Manley, executor of the estate of
113 George Manley, deceased, as successor to said William H. Risk, as such executor. And there-on came L. F. Bird, Esq., attorney for the defendant and for said R. M. Manley as executor of the estate of George Manley deceased, and by consent of parties in open court said application and motion *is* sustained and it is by the court ordered that said action proceed in favor of said plaintiff and against R. M. Manley, as executor of the estate of George Manley, deceased as successor of said William H. Risk as executor of said estate.

Thereafter and on to wit: April 6, 1897, the plaintiff filed in said cause his supplemental petition, and same is in the words and figures following, to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased, Defendant.

Supplemental Petition.

Comes now the said plaintiff and for his supplemental petition herein, the leave of the court having been first had and obtained, says:

That since the commencement of the above-entitled action and on to wit: the 23rd day of January 1897, the defendant William H. Risk, resigned his trust as executor of the estate of George Manley, deceased, and there-on his interests as the personal representa-ive of said George Manley deceased, did cease and determine, and R. M. Manley was duly appointed and did duly qualify as executor of the estate of George Manley, deceased, and there-on became the successor of William H. Risk, as such executor, which said resignation was accepted and the order appointing said R. M.

Manley as such executor was duly made, by the orphans'
114 court in and for the county of Union in the State of New Jersey, which court then had jurisdiction and authority to make the orders in relation thereto and there-on the said R. M. Manley did accept the trust as such executor and thereby succeeded to the said William H. Risk as executor of George Manley deceased.

That on March 27th, 1897 by order of this court, said R. M. Manley as such executor was substituted as defendant in the above-entitled cause, and as successor of said William H. Risk, executor as aforesaid, and there-on the plaintiff, was by leave of court permitted to prosecute said action against said R. M. Manley, as executor of the estate of George Manley deceased, and as successor of said William H. Risk as such executor and this plaintiff here adopts his petition as filed herein in all respects as if copied and set out as his cause of action against the said R. M. Manley executor of the estate of George Manley deceased, as successor of said William H. Risk as such executor, and here renews his prayer for judgment as stated in his original petition herein.

(Signed) JACKSON & JACKSON,
Attorneys for Plaintiff.

Endorsed on the back as follows: No. 7833. R. A. Park *vs.* William H. Risk, executor etc., Supplemental petition. Filed April, 6, 1897. J. N. Cox, clerk.

Thereafter and on to wit:- November, 8, 1897, and by leave of court first had and obtained, said defendant filed answer in said cause, and same is in the words and figures following, to wit:

In the District Court of Atchison County, State of Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased; Reuben M. Manley, Executor of the Estate of George Manley, Deceased, Substituted Defendant, Defendant. } No. 7833.

115 *Answer.*

Comes now here the said defendant, Reuben M. Manley, executor of the -state of George Manley, deceased, and for his answer to the petition of the plaintiff and the amendment thereto, filed herein, says that he admits for the purpose of this case only, that George Manley deceased at the county of Union, in the State of New Jersey, on or about the 30th day of December, A. D. 1891, being at the time of his death a resident and citizen of said county and State, and that at the time of his death the said George Manley, deceased, was the owner and holder of shares of stock of the Kansas Trust and Banking Company, amounting to the sum of twenty-seven thousand five hundred dollars ($27,500.00); that the said George Manley died

testate, having made and published his last will and testament, and codicile thereto, therein and thereby designating and naming Reuben M. Manley, William H. Risk as executors of, and trustee- under, his said last will and testament; that on or about the 22nd day of January, A. D. 1892 said last will and testament, and codicile thereto, were duly admitted to probate in the orphans' court in and for the county of Union, State of New Jersey, and letters testamentary were issued to William H. Risk, one of the said executors and trustees, and thereon, and on said day, said William H. Risk duly accepted said trust and qualified as such executor and trustee, and thereon and thereby, said William H. Risk, as such executor, became seized and poss-ed of all the property of the late George Manley, deceased, lying and being situate in the State of Kansas; that on the 15th day of July A. D. 1896, letters testamentary were duly issued to said Reuben N. Manley the other of said executors and trustees, by the orphans' court of said Union county, State of New Jersey, and on said day said Reuben M. Manley, duly accepted said trust, and qualified as such executor and trustee; that on the 23rd day of January A. D. 1897, said William H. Risk, was by said orphans' court of said Union county, New Jersey, duly rel*e*ived
116 and discharged from his office as one of said executors and trustees under the said last will and testament of said George Manley, deceased, and there-on and thereby said Reuben M. Manley, as such executor, became seized and possesses of all the property of the late George Manley deceased, lying and being situate in the State of Kansas; that in all the proceedings in said orphans' court, and in the office of the surrogate of the said Union county, New Jersey, in the probate of said will and codicile and the granting of letters testamentary thereon, the orphans' court and the surrogate thereof, were duly and legally authorized and empowered to take proof of the execution of said will, and to make order of probate thereof, and grant letters testamentary to said William H. Risk and Reuben M. Manley, as such executors; that under and by virtue of such ownership of such shares of stock by said George Manley, deceased, and the making of said will and p.obate thereof, and the appointment of said William H. Risk and Reuben M. Manley, as executors of the said estate of George Manley, deceased, and the discharge of said William H. Risk, as such executor, said defendant, Reuben N. (Manley, executor of the estate of George Manley, deceased, became, and is now, a stockholder of the said The Kansas Trust and Banking Company, and as such executor of said estate is the owner and holder of said shares of stock of said corporation, amounting to the sum of twenty-seven thousand five hundred dollars ($27,500); that said plaintiff is a creditor of the said The Kansas Trust and Banking Company, a corporation duly incorporated and organized under the laws of the State of Kansas, in the amount and on account of the debenture bonds set out in the petition of the plaintiff; and said defendant denies the truth of each and every statement, allegation and averment, in said petition of the plaintiff, and the amendment thereto, made *pr* contained, excepting as hereinbefore expressly admitted.

Second. Said defendant further alleges that heretofore, and
117 on, to wit: the 13th day of March A. D. 1893, one Freeling Tufts was duly appointed the receiver of the Kansas Trust and Banking Company, by the circuit court of the United States, for the district of Kansas, first division, in the suit of William H. Risk, executor of the estate of George Manley, deceased, against The Kansas Trust and Banking Company. That said receiver duly qualified as such and was, at the time this action was brought, in the possession of all of the property of said corporation, and had cash on hand of said corporation in the sum of ten thousand dollars (10,000), and lands of said corporation that he was selling or renting, *by* such receiver never carried on the usual and ordinary business of said corporation, which was the loaning of money on farm mort--ages, and selling said mortgages, and after the appointment of such receiver said corporation did not transact any of its usual and ordinary business, but said corporation has never been dissolved, by the expiration of the time limited in its charter, or by a judgment of dissolution rendered by a court of competent jurisdiction.

Said defendant further alleges, that said plaintiff has never reduced his said claim to judgment either against the said The Kansas Trust and Banking Company, or its said receiver, and that said plaintiff cannot maintain this action, for that the act entitled, "Act concerning private corporations" approved March 6th, 1883, and under which act plaintiff claims to have brought this action, is unconstitutional and void, in that said bill contains more than one subject, and such subjects are not clearly expressed in its title; and it amends section 32 and 44 of the said act concerning private corporations, and does not contain the entire sections amended, and such sections so amended were not repealed, and the said act is in violation of section 16 article 2, of the constitution of the State of Kansas.

Third. Said defendant further alleges that there is a defect of parties plaintiff herein, and that said action should have been
118 brought by the said Freeling Tufts, if at all, as receiver of the Kansas Trust and Banking Company; and that said action should have been brought if at all, in equity, and for the benefit of all the creditors of said corporation.

Fourth. Said defendant further alleges that to secure the debenture bonds owned by the plaintiff and sued on herein, there *was* deposited with the First National Bank of Atchison, Kansas, as trustee, first mortgages upon real estate of equal face value with said debentures. That such first mortgages are still available as security for said debentures, and is a fund specially set a*p*rat for the payment of the same, and that the market value of said first mortgages is fully forty (40) per cent. of the claim of the plaintiff sued on herein, and that by reason thereof plaintiff must first exhaust such special security before he can maintain this action.

Sixth. Said defendant further alleges that since the commencement of this action, the Central Savings Bank of St. Joseph, Missouri, a judgment creditor, as it claims, of the said The Kansas Trust and Banking Company, in the sum of about twelve thousand

ollars (12,00–) commenced an action in the district court of Atchi
on county, Kansas, for itself, and all other creditors of the said
The Kansas Trust and Banking Company, against this defendant,
o recover the full amount of the liability of this defendant as a
tockholder in the said The Kansas Trust and Banking Company,
nd such action is still pending and undetermined.

Seventh. Said defendant further alleges that since the commence-
ment of this action, Mary A. Manley recovered a judgment against
the said The Kansas Trust and Banking Co., and Freeling Tufts,
its receiver, for over thirty-five thousand dollars, (35,000), in the
circuit court of the United States, for the district of Kansas,
119 first division, and caused execution to issue thereon, directed
to the marshall of the United States, for the district of Kan-
sas, and said execution was duly returned by said marshall "*nulla
bona*," and thereafter, and after the property of the said The Kansas
Trust and Banking Co., and its said receiver, had been entirely ex-
hausted, and divided amongst its credotors, she duly commenced her
action in the district court of Atchison county, Kansas, against this
defendant, to recover the full amount of the liability of this defend-
ant as a stockholder in the said The Kansas Trust and Banking Co.,
and such action is still pending and undetermined.

And said defendant having fully answered herein, asks that he
may go hence without day and recover his costs herein.

(Signed) L. F. BIRD,
Attorney for Defendant.

Endorsed on the back: No. 7833, Richard A. Park, *vs.* Wm. H. Risk, ex. etc., Answer. Filed Nov. 8th, 1887, by J. N. Cox, clerk. L. F. Bird, att'y for defendant.

Thereafter an- on, to wit: November 10th, 1897, plaintiff filed his reply in said cause, and same is in the words and figures following, to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased; Reuben M. Manley, Executor of the Estate of George Manley, Deceased, Substituted Defendant. } No. 7831.

Reply.

Comes now the said plaintiff and for reply to the answer of the substituted defendant Reuben M. Manley, executor of the es-
120 tate of George Manley deceased, says:

I.

That he denies each and every statement, averment and allegation of new matter or matter of defense contained in said answer,

which is in any manner contrary to or inconsistent with the allegations of the plaintiff's petition.

II.

The plaintiff alleges and ch-rges the fact to be that the said George Manley at the time of his decease, and long prior thereto, was not a citizen of the State of Kansas, nor was he within said State of Kansas; and that said William H. Risk and Reuben M. Manley were not, nor were either of them, residents within or citizens of the State of Kansas at any time after the appointment of them respectively as executor of the estate of said George Manley deceased, nor were they or either of them within the said State of Kansas after their respective appointments as such executor, but were continuously out of and beyond the said State of Kansas.

III.

For reply to the second count or defense stated in the answer of the said defendant, the plaintiff says that the same does not state facts constituting any defense to plaintiff's cause of action, and that neither of the facts alleged therein constitute any defense to plaintiff's cause of action.

Plaintiff further alleges that the pretended appointment of said Freeling Tufts, as said receiver of the Kansas Trust and Banking Co. and his qualifications as such, nor the want of dissolution of said corporation, to wit, the Kansas Trust and Banking Company either by expiration of the time limited in its charter or by judgment of dissolution rendered by a court of competent jurisdiction, nor the failure of said plaintiff to reduce his claim to judgment either against said The Kansas Trust and Banking Company or Freeling Tufts, receiver thereof, constitutes any defense to plaintiff's cause of action.

121 Plaintiff further says that at the time of the commencement of this action or at any time thereafter, the said Freling Tufts, receiver, did not have, nor has he at any time had, since in his possession, cash on hand of the said corporation, the said Kansas Trust and Banking Company, amounting to the sum of $10,00-.00 or any sum in excess of $3,000.00; nor did he at that time or since then have in his possession as such receiver, lands of said corporation of exceeding the value of $1,000.00; that during all the time the said Freeling Tufts had possession of the property of the said The Kansas Trust and Banking Company, it was indebted to divers and sundry persons in amounts exceeding $200,000 and that during all such time said receiver did not have, nor did the said The Kansas Trust and Banking Company have, property, money and rights, exceeding in amount and value 15 % of its entire indebtedness; and said The Kansas Trust and Banking Company was at the time of the commencement of this action and for a long time prior thereto, wholly insolvent and had no means with which to pay its liabilities which at that time and for a long time prior thereto exceeded the sum of $200,000 and upon all the property of said The Kansas Trust and

Banking Company, at the time of the appointment of said receiver and subsequent thereto, there were mortgages and encumbrances in amount largely in excess of the value thereof.

Plaintiff further says that at the time of the commencement of said action, he did not have nor has he had since any lien upon or interest in any of the property of the said The Kansas Trust & Banking Company, so in the hands of said Freeling Tufts, receiver of said company.

IV.

For reply to the third defense stated in the answer of defendant, plaintiff says: That the same does not state facts sufficient to constitute any defense to plaintiff's cause of action and that the facts therein alleged and stated, if true, do not constitute any defense to the cause of action stated in plaintiff's petition.

122

V.

For reply to the fourth count of said answer, plaintiff says that the same does not constitute any defense to plaintiff's cause of action as stated in his petition.

VI.

For reply to the fifth count of defendant's answer, plaintiff says that the same does not constitute any defense to plaintiff's cause of action as stated in his petition; that the facts therein alleged and stated do not constitute any defense to plaintiff's cause of action as stated in his petition.

And plaintiff for further reply to said fi-th count of said *as* answer says: That he admits that there were deposited by the Kansas Trust and Banking Company with the First National Bank of Atchison, Kansas, as trustee, mortgages upon real estate of equal face value with the debentures held by the plaintiff and described in plaintiff's petition; but plaintiff denies that such mortgages were first mortgages upon said real estate and denies that they are still available as security for said debentures, and denies that the same are or at any time were, specifically set apart for the payment of the debenture bonds held by the plaintiff, and denies that the market value thereof is 40 % of the claim of the plaintiff sued on herein, and denies that the plaintiff is under any obligation, legal or equitable, to first exhaust such special security before he can maintain this action.

For further reply to said fifth count of said answer, the plaintiff says: That there *was* deposited by the Kansas Trust and Banking Company with the First National Bank of Atchison, Kansas, as trustee mortgages upon divers and sundry pieces and parcels of lots and lands which mortgages purported to have been given for the sum of $12,400.00 and the same were deposited with said bank as trustee to secure debenture bonds of the Kansas Trust and Banking Company, series "B" aggregating the sum of $120400.00 which were of

123 the same class and character as those held by the plaintiff, and of which $120,400.00 of debenture bonds, those held by the plaintiff constitute a part; that subsequent to the appointment of

the said Freeling Tufts receiver, said mortgages were by order of the court by which said receiver was appointed, transferred and delivered to S. A. Frazier, trustee; that said S. A. Frazier, in the due discharge of his duties as such trustee, under the orders of the court, by which he was so appointed trustee, foreclosed said mortgages and collected and realized upon all the securities so delivered to said The First National Bank of Atchison Kansas, to secure said debenture bonds, and upon the purchase of the lands described in said mortgages at such foreclosure sales by the trustee, they were purchased at and for the prices and amounts aggregating about 40% of the face value and amount of said debenture bonds, and the title to said property is now held by said S. A. Frazier as trustee for the benefit of the holders of said debenture bonds, and the same is insufficient in amount and value to pay more than 30% of the face value of the said debenture bonds series "B" other than the debenture bonds so held by this plaintiff, and that upon the just and proper application of said property and funds so *so* in *in* the hands of said S. A. Frazier, trustee, upon and to the payment of said debenture bonds series "B" other than those held by the plaintiff and to recover the amount of which this action is brought—the same will be wholly insufficient to pay more than 30% of said debenture bonds other than those held by the plaintiff; and by reason thereof this plaintiff has the right and it is his duty towards said holders of other debenture bonds series "B," to recover out of the property of the defendant as a stockholder of said corporation, and to that extent relieve the property and funds in the hands of the said trustee from the payment of the debenture bonds so held by this plaintiff, as the liability of the defendant is a property and fund to which said other holders of debenture bonds series "B" cannot now look for the payment of the indebtedness so due to them on account of such debenture bonds.

Plaintiff further says that the total face value of the debenture bonds so issued and outstanding at the time of the commence-
124 ment of this action was the sum of $120,400.00 and besides those held by the plaintiff exceeded the sum of $118.00, and that the total value of the mortgages so pledged as aforesaid to said trustee to secure the same, did not exceed the sum of $40,000.00 and that said mortgages *has* been foreclosed and the title to the property described therein obtained by foreclosure sale an- purchase by said trustee, before the commencement of this action, and the same is now held by said S. A. Frazier as such trustee for the ben-fit of the holders of such debenture bonds "series B," and all of the interest of the said The Kansas Trust and Banking Company in said mortgages and securities so deposited with said trustee had been realized upon by foreclosure and the sale of the property described in the mortgages, and the amount for which said properties described in said mortgages were purchased is held by said trustee for the benefit of such holders of said debenture bonds series "B" as may be entitled thereto, and the same is not held for the use and benefit of said The Kansas Trust and Banking Company nor the receiver thereof, nor has the said The Kansas Trust and Banking

Company at any time since the commencement of this action had any interest therein.

VII.

Plaintiff for reply to the seventh count of defendant's answer says: That the facts therein alleged, if true, do not constitute any defense to plaintiff's cause of action.

Wherefore, plaintiff renews his prayer for judgment as stated in his petition.

(Signed) JACKSON & JACKSON,
Attorneys for Plaintiff.

Endorsed on the back: No. 7833. Richard A. Park, *vs.* Wm. H. Risk, executor of George Manley estate. Reply. Filed Nov. 10, 1897, by J. N. Cox, clerk.

Thereafter and on to wit: December 13, 1897, said cause was tried to the court and without a jury, a trial by jury being waived,
125 and judgment was rendered in favor of the plaintiff and against the defendant, and the property attached was ordered sold, defendant excepting. And said judgment was entered of record in the journals of said court in Journal 28, page 422, and is in the words and figures following, to wit:

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased, Defendant; Reuben M. Manley, Executor of the Estate of George Manley, Deceased, Substituted Defendant.

Journal Entry.

Now on this 15th day of December 1897, comes the said plaintiff by Jackson & Jackson his attorneys as also comes the said defendant by L. F. Bird, his attorney, and this cause being regularly called for trial, a jury being waived by agreement of counsel and the cause tried to the court and the court having heard the evidence doth find that the statements and allegations of the plaintiff's petition are true and that the plaintiff is entitled to recover of and form William H. Risk as executor of the state of George Manley deceased and of and from Reuben M. Manley as executor of the estate of George Manley deceased against whom said action has been revived as substituted defendant herein, the sum of twenty-four hundred sixty-three and 7/100 ($2463.07) dollars with interest thereon from this date at the rate of six (6) per cent. per annum and costs of suit; and to an order of sale of the property attached and hereinafter described.

It is therefore ordered, adjudged and decreed by the court that the plaintiff have and recover of and from William H. Risk, as executor of the estate of George Manley, deceased and of and
126 from Reuben M. Manley, as executor of the estate of George Manley deceased, against whom this action has been revived

as substituted defendant, the sum of twenty-four hundred sixty-three and 7/100 ($2463.07) dollars, with interest thereon from this date at the rate of six (6) per cent. per annum, and costs of suit taxed at the sum of — dollars, for all which let execution issue.

It is further ordered adjudged and decreed by the court that an order of sale issue out of this court for the sale of the property attached in this action to wit: the northeast quarter of section twenty-five (25) in township five (5) range twenty (20) lying and being in Atchison county, Kansas, for the payment of said sum adjudged to be due to the plaintiff. And that upon the sale of said property the proceeds thereof be applied:

First. In the payment of the costs of this action and the costs which may accrue upon the order of the sale and sale of said property.

Second. The taxes so due to the plaintiff upon said judgment together with the interest as stated therein; the balance if any to be brought into court to abide the further order of the court herein, defendant excepting.

(Signed) W. T. BALND, *Dist. Judge.*

Thereafter and on to wit: December, 15, 1897, and at the same term of court at which said judgment was rendered the defendant filed in said cause his motion for a new trial, and the same is in the words and figures following to wit:

In the District Court of Atchison County, State of Kansas.

RICHARD A. PARK, Plaintiff,
vs.
REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Defendant.

127 *Motion for New Trial.*

Comes now here the said defendant, and moves the court for a new trial herein, for the following causes to wit:

First. Error in the assessment of the amount of recovery, same being too large.

Second. That the decision and judgment of the court *is* not sustained by sufficient evidence.

Third. That the decision and judgment of the court *is* contrary to law.

Fourth. Error of law occurring at the trial, and excepted to by the defendant.

(Signed) L. F. BIRD,
Attorney for Defendant.

Endorsed on the back: No. 7833. Richard A. Park, *vs.* Reuben M. Manley ex.—etc. Motion for new trial. Filed Dec. 15, 1897 by J. N. Cox, clerk.

Thereafter an- on to wit: June 7, 1898, the court overruled the said motion of the defendant for a new trial, defendant excepting, and the order of the court overruling said motion for a new trial was entered of record in the journals of said court in Journal 129, page 20, and is in the words and figures following, to wit

RICHARD A. PARK, Plaintiff,
vs.
R. M. MANLEY, Executor of the Estate of George Manley, Deceased, Substituted for William H. Risk, Executor of said Estate, Defendants.

Now on this 27th day of June, 1898, comes the said plaintiff by Jackson & Jackson his attorneys as also comes the said defendant
128 by L. F. Bird his attorney, and thereupon came on for hearing the motion of the defendant for a new trial as filed herein; which motion having been argued by counsel and considered by the court was by the court overruled and denied, to which ruling and decision of the court the said defendant then and there excepted.

Thereupon, for good cause shown, time is extended to the said defendant for ten days from this date in which to make and serve upon plaintiff, a case-made for the court of appeals or supreme court and time allowed the plaintiff for five days thereafter in which to suggest and serve amendments, the same to be settled upon five days' notice in writing by either party.

129 Thereafter and on to wit: June 18, 1898 the plaintiff filed in said cause a motion to amend proof of publication, and same is in the words and figures following to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Defendant.

Motion of Plaintiff to Have Proof of Publication Amended and Corrected.

Comes now the said plaintiff and moves the court to order that said plaintiff filed amended proof of publication of notice in said cause, for the reason that the proof of publication as filed therein is contradictory as to the kind of newspaper in which the same was published and is incorrect as to the number of issues of the paper in which such notice was published.

Affidavits, record and oral evidence will be used on hearing hereof.

(Signed) JACKSON & JACKSON,
Attorneys for Plaintiff.

To L. F. Bird, Esq., attorney for defendant:

You are hereby notified that plaintiff has filed a motion of which the above and foregoing is a copy in the above court and cause

and the same will be presented on Tuesday, June 21st, 1898, at 9 o'clock or as soon thereafter as plaintiff can be heard.

(Signed) JACKSON & JACKSON,
Attorneys for Plaintiff.

Service of the above and foregoing notice is hereby acknowledged to have been made on me this — day of ——, A. D. 1898.

——,
Attorney for Defendant.

Endorsed on the back: No. 7833. R. A. Park *vs.* R. M. Manley, executor, etc. Motion for leave to amend proof of publica-
130 tion and notice. Filed June 18, 1898, by J. N. Cox, clerk.

Thereafter and on to wit: June 24, 1898, the plaintiff filed in said cause, notice of motion to amend proof of publication in said cause, and same is — the words and figures following to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased, Defendant; Reuben M. Manley, Executor of said Estate, Substituted Defendant. } No. 7833.

To L. F. Bird, Esq., attorney for the defendant:

You are hereby notified that on Saturday, June 25th, 1898, at 9 o'clock a. m. or as soon thereafter as plaintiff can be heard, the motion of plaintiff for leave to amend the proof of publication notice in said cause, will be called for hearing in the district court room in the city of Atchison, Atchison county, Kansas; of which motion a copy was sent you by mail on June 17th, 1898, but of which notice no acknowledgement was made, and said motion could not then be presented because of the illness of the judge of said court.

(Signed) JACKSON & JACKSON,
Attorneys for Plaintiff.

STATE OF MISSOURI, } *ss:*
Jackson County, }

W. R. S. Piatt being duly sworn upon his oath says that on the 23rd day of June A. D. 1898, at Kansas City, Missouri he delivered to L. F. Bird, Esq., the attorney for said defendant above named, a copy of the above and foregoing notice.

(Signed) W. R. S. PIATT.

Subscribed and sworn to before me this 23rd, day of June
131 A. D. 1898.

Wotness my hand and official seal hereunto affixed the day and year above written.

[L. S.]

(Signed) CHARLES W. GERMAN,
Notary Public, Jackson County, Missouri.

My commission expires M'ch 9, 1899.

Endorsed on the back: No. 7833. Richard A. Park, *vs.* Wm. H. Risk, ex't'r etc. Notice of motion to amend proof of publication. Filed June 24–1898, by J. N. Cox, clerk.

Thereafter and on to wit: June 25, 1898 the court made an order permitting the plaintiff to file in said cause an amended proof of publication therein, and said order was duly entered of record in the journals of said court in Journal 29, page 49, and is in the words and figures following to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased; Reuben M. Manley, Executor of said Estate, Substituted Defendant. } No. 7833.

Now on this 25th day of June 1898, comes the said plaintiff by Jackson & Jackson his attorneys and presents to the court the motion of the plaintiff for leave to file amended proof of publication of notice in the above-entitled cause, and therewith presents proof of service of notice of this hearing as on file herein, and it appearing to the court that the said defendant has had due notice of the hearing of said motion, and having failed to appear or show cause
132 why said moyion should npt be allowed, and the court having heard said motion and the evidence in support thereof and the premises being fully seen and understood, said motion is sustained and said plaintiff is allowed to file amended proof of publication of notice which notice and proof of publication thereof is by the court examined and approved and the approval of the court endorsed thereon, and the same is allowed to be filed herein in all repsects as if the same had been made, examined and approved by the court and filed in said cause at the time of th- trial thereof.

Thereafter and on to wit: June 25, 1898 the plaintiff filed in said cause an amended proof of publication notice, and same is in the words and figures following, to wit:

Publication Notice.

To William H. Risk, executor of the estate of George Manley, deceased:

You are hereby notified that R. A. Park as plaintiff, has filed his petition in the district court of Atchison county, State of Kansas,

against you as defendant and that you, William H. Risk, executor of the estate of George Manley, deceased, have been sued and must answer the petition filed by said R. A. Park, as plaintiff, on or before the 14th day of January, 1896, or the petition will be taken as true and judgment, for the sum of two thousand dollars with interest thereon, at 7 per cent. per annum from the 15th day of February, 1893, less one credit of ($100.00) made March 22nd, 1894, and one credit of (100.00) dollars made September 5th, 1895, and an order of sale of the following-described property attached in said cause, to wit: the northeast quarter of section twenty-five (25) township five (5) of range twenty (20) lying and being situate in Atchison county, State of Kansas, will be rendered accordingly.

(Signed) R. A. PARK, *Plaintiff*,
By JACKSON & JACKSON, *Attorneys.*

(7833) 11-30-23t.

STATE OF KANSAS, } ss:
County of Atchison, }

133 A. J. Felt being duly sworn upon oath states that he was on the dates hereinafter mentioned, publisher of the Atchison Champion, a daily newspaper, printed and published in said Atchison county; and of general circulation therein, and which has been so printed and published in said Atchison county continuously and uninterruptedly for a period of fifty-two consecutive weeks last preceeding the date of the first publication of the annexed notice and made a part thereof, the notice, a true copy of which is hereto annexed, and made a part hereof, was published in said daily newspaper, the first publication thereof being on the 30th, day of November, A. D. 1895, and the last publication thereof being on the 8th day of January A. D. 1896, and in each and every issue of said daily newspaper between those dates, both inclusive.

(Signed) A. J. FELT.

Subscribed in my presence and sworn to before me, this 18th day of June, A. D. 1898.

(Signed) Z. E. JACKSON,
Notary Public.

My commission exp. Dec. 29, 1898.

Endorsed on the back: No. 7833. Richard A. Park, *vs.* Wm. H. Risk, executor, Proof publication of notice. Filed June 25, 1898, by J. N. Cox, clerk.

June 25, 1898.—Examined and approved

W. T. BLAND,
District Judge.

And thereafter and on the 12th day of December 1899, there was filed in said court and cause the mandate and judgment of the supreme court of the State of Kansas dismissing the petition and proceedings in error of said defendant as plaintiff in error to reverse the judgment herein,

4 Thereafter an- on to wit; May 31, 1900 the defendant filed a motion in said court and cause to set aside the judgment in d cause, and same is in the words and figures following to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
ILLIAM H. RISK, Executor of the Estate of George Manley, Deceased; R. M. Manley, Executor of said Estate, Substituted Defendant, Defendant. } No. 7833.

Motion to Set Aside Judgment.

Comes now here the above-named defendant, R. M. Manley, execu- or of the estate of George Manley, deceased, and moves the court to et aside, vacate and annul the pretended judgment heretofore, ren- ered in favor of the plaintiff and against the defendant, and also he order and judgment of the court ordering the property herein ttached to be sold to satisfy said judgment for the following rea- ons, to wit:

First. For that the said district court had no jurisdiction to enter- ain said suit, and to render judgment therein and to order the prop- rty attached herein to be sold to satisfy said judgment.

Second. For that said judgment and the record in the above-entitled ause, shows that the plaintiff was not a judgment creditor of the Kansas Trust and Banking Company, and that the Kansas Trust and Banking Company had not been dissolved by the expiration of the ime limited in its charter or by a judgment of dissolution rendered by a court of competent jurisdiction, and that the plaintiff had a special security for the payment of the debenture bonds sued on, and did not allege in his petition that said special security had 135 been exhausted, and that the act of the legislature of the State of Kansas, entitled "An act concerning private corporations," approved March 6, 1883, and on which the action of the plaintiff is grounded and based is unconstitutional and void, and in conflict with sec. 16, art. 2 of the constitution of the State of Kansas, in that said amendatory act contains more than one subject, and such subject is not clearly expressed in the title of said act, and said act amends what is now par. 1204. G. S. 1889. and other sections of the corporation act, without containing or repealing the entire sections amended.

Third. For that said judgment and the record in the above-entitled cause shows that the above-entitled action was a suit against the executor of the estate of a dead man, and under the constitution and laws of the State of Kansas, the probate court of Atchison county, Kansas, and not the district court of Atchison county, Kansas, has jurisdiction to entertain the claim of the plaintiff, if he had one. That under the law no attachment could legally issue against the property of the defendant executor, and sec. 203 of the executors' and administrators' act, or any other statute of the State of Kansas, which attempts to permit such attachment is unconsti-

tutional and in contravention of sec. 6, art. 3, and sec. 8, art. 3, of the constitution of the State of Kansas, and of the laws of the State of Kansas relating to the proving of claims against the estate of deceased persons, and also violates secs. 1 and 2, art. 4, and the 14th amendment, Constitution of the United States, and sec. 27, of the act of Congress creating the Territory of Kansas. That the said district court of Atchison county, Kansas, in rendering said judgment, and in ordering the sale of said attached property did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the orphans' court of Union county, New Jersey, where the said estate of George Manley was being administered (Const. U. S. art. 4, sec. 1) and did not accord to the defendant and his predecessor, a citizen of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas (Const. U. S. art. 4, sec. 2), and enforced the said sec. 203 of the executors' and administrators' act of the State of Kansas, which abridged the privileges of the defendant, and his predecessor citizens of the United States, and their immunity from suit by attachment, and deprived them of their property, without due process of law, and denied them the equal protection of the laws, (14th amnd. Const. U. S.).

Affidavits, record and other evidence will be used on the hearing of this motion.

(Signed) DAVID MARTIN &
L. F. BIRD,
Attorneys for Defendant.

The above-named plaintiff, and his attorneys of record, Jackson & Jackson, will take notice that the defendant, above named will call up for hearing the above motion in the court-room of the district court of Atchison county, Kansas, on Saturday, June 2, 1900, at 10 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, and that affidavits and other evidence will be used on the hearing of said motion

136 (Signed) DAVID MARTIN &
L. F. BIRD,
Attorneys for Defendant.

Endorsed on the back: No. 7833. Richard A. Park *vs.* Wm. H. Risk, ex'r. Motion to set aside judgment. Filed May 31, 1900. By J. N. Cox, clerk. Davis Martin L. F. Bird attorneys for the defendant.

Thereafter and on to wit: May 31, 1900 the defendant filed a motion in said court and cause to withdraw the order of sale isued in said cause, and same is in the words and figures following to wit:

In the District Court of Atchison County, Kansas.

RICHARD A. PARK, Plaintiff,
vs.
WILLIAM H. RISK, Executor of the Estate of George Manley, Deceased; R. M. Manley, Executor of said Estate, Substituted Defendant. } No. 7833.

137 *Motion to Withdraw Execution or Order of Sale.*

Comes now here the above-named defendant, R. M. Manley, executor of the estate of George Manley, deceased, and moves the court to withdraw the execution, or order of sale issued in the above-entitled action, and under which the sheriff of Atchison county, Kansas, has advertised the real property attached and order- sold herein, for sale, for the following reasons, to wit:

First. For that the said district court had no jurisdiction to entertain said suit and to render judgment therein and to order the property attached herein sold to satisfy said judgment.

Second. For that said judgment, and the record in the above-entitled cause, shows that the plaintiff was not a judgment creditor of the Kansas Trust and Banking Company had not bee- dissolved by the expiration of the time limited in its charter or by a judgment of dissolution rendered by a court of competent jurisdiction, and that the plaintiff had a special security for the payment of the debenture bonds sued on, and did not allege in his petition that said special security had been exhausted, and that the act of the legislature of the State of Kansas, entitled "An act concerning private corporations," approved March 6, 1883, and on which the action of the plaintiff is grounded and based is unconstitutional and void, and in conflict with sec. 16, art. 2, of the constitution of the State of Kansas, in that said amendatory act contains more than one subject, and such subject is not clearly expressed in the title of said act, and said act amends what is now par. 1204, G. S. Ks. 1889, and other sections of the corporation act, without containing or repealing the entire sections amended.

Third. For that said judgment and the record in the above-entitled cause shows that the above-entitled action was a suit against the executor of the estate of a dead man, and under the con-
138 stitution, and laws of the State of Kansas, the probate court of Atchison county Kansas, and not the district court of Atchison county, Kansas, had jurisdiction to entertain the claim of the plaintiff if he had one. That under the law no attachment could legally issue against the property of the defendant executor and sec. 203 of the executors' and administrators' act, or any other statute of the State of Kansas, which attempts to permit such attachment is unconstitutional and in contravention of sec. 6. art. 3, and sec. 8, art. 3 of the constitution of the State of Kansas, and of the laws of the State of Kansas relating to the proving of claims ag-inst the estate of deceased persons, and also violates secs. 1 and 2, art. 4, and the 14th

amendment, Constitution of the United States, and sec. 27, of the act of Congress creating the Territory of Kansas. That the district court of Atchison county, Kansas, in rendering said judgment, and in ordering the sale of said attached property did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the orphans' court of Union county, New Jersey, wh-rer the said -s-ate of George Manley, was being administered (Const. U. S. art. 4, sec. 1,) and did not accord to the defendant and his predecessor, a citizen of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas (Const. U. S. art. 4, sec. 2), and enforced the said sec. 203 of the executors' and administrators' act of the State of Kansas, which abridged the privileges of the defendant, and his predecessor, ci-izens of the United States, and their immunity for suit by attachment and deprived them of their property, without due process of law, and denied them equal protection of the laws (14th amend. Const. U. S.).

Fourth. For that the above-named defendant has filed his motion to set aside the judgment and order of sale herein, for the reasons above stated, and said motion is now pending and undeter-
139 mined by this court, and justice would be done by withdrawing said order of sale pending the hearing and determination of the said motion of the defendant to set aside judgment and order of sale.

Affidavits, record -nd other evidence will be used on the hearing of this motion.

(Signed) DAVID MARTIN &
L. F. BIRD,
Attorneys for the Defendant.

The above-named plaintiff, and his attorneys of record, Jackson & Jackson, will take notice that the defendant, above named will call up for hearing the above motion in the court-room of the district court of Atchison county, Kansas, at Atchison, Kansas on Saturday June 2nd, 1900 at 10 o'clock a. m. of said day or as soon thereafter as counsel can be heard, and that affidavits and other evidence will be used on the hearing of said motion.

(Signed) DAVID MARTIN &
L. F. BIRD,
Attorneys for Defendant.

Endorsed on the back: No. 7833. Richard A. Park, *vs.* Wm. J. Risk, ex'r. Motion to withdraw order of sale. Filed May 31, 1900, by C. N. Cox, clerk. David Martin & L. F. Bird, att'y- for defendant.

140 And thereafter, and on to wit: June 2, 1900 said motions so filed by the defendant coming on to be heard, and said defendant having given plaintiff due notice of the hearing of said motion, the plaintiff appeared by Jackson & Jackson, his attorneys, and the said defendant appeared by L. F. Bird his attorney and the said defendant introduced and read in evidence the pleadings, pro-

cess, writ of attachmeny and return thereon, affidavit for publication, proof of publication and judgment in the above-entitled action and all the pleadings, filed journal entries and judgments in the above-entitled action, as hereinbefore fully copied out herein, as also the order of sale issued herein for the sale of the property attached herein with sale advertised for June 30, 1900 at 2 p. m. at the east front door of the Atchison County court-house, and no other evidence was introduced or heard on the hearing of said motions. And the court having heard the evidence and argument of counsel thereon had, on said June 2nd, 1900 overruled said motions and each the-of, the said defendant excepting to the overruling of each of them, and immediately there-on, and on the same day and for good cause shown, said defendant was allowed ten days to make and serve a case-made herein, for the supreme court of the State of Kansas, and said plaintiff was allowed five days thereafter in which to make and serve suggestions of amendments to said ca-e-made, and said case-made to be thereafter settled on five days' notice by either party.

The above and foregoing contains a statement of all the pleadings, evidence, judgment and other matters in the above-entitled action for the supreme court of the State of Kansas.

DAVID MARTIN &
L. F. BIRD,
Attorneys for the Defendant, Reuben M. Manley, Executor of the Estate of George Manley, Deceased.

Service of the above case-made is hereby acknowledged to have been made on us this June 12, 1900.

JACKSON & JACKSON,
Att'ys for Pl'ff.

141 And now on this July 3, 1900 comes on for hearing the application of the above defendant for a settlement of the above case-made and the suggestions of amendments thereto, and the defendants having given due notice of this application and all parties appearing at this time the above and foregoing is settled with the suggestions of amendments thereto, and is signed by me as a true and perfect case-made herein, and is ordered filed as a part of the record in this cause.

(Signed) W. T. BLAND,
District Judge.

Attest:
J. N. COX,
Clerk Dist. Court,
By KATE KENNISH,
[L. S.] *Dep'ty Clerk.*

Filed Jul- 8, 1900.
J. N. COX, *Clerk.*
By KATE KENNISH, *Dep. Clerk.*

142 And afterwards on the 13th day of November 1900 there was filed in the office of the clerk of the supreme court of the State of Kansas a waiver of the issuance and service of summons in error, which waiver with the endorsements thereon is in words and figures as follows, to wit:

143 In the Supreme Court of the State of Kansas.

R. M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
R. A. PARK, Defendant in Error.

Issue and service of summons in error is hereby waived and appearance entered in the above-entitled cause this September 1st, 1900.

JACKSON & JACKSON,
Attorneys for Defendant in Error.

Endorsed on back: No. 11833. R. M. Manley, executor, etc., vs. R. A. Park. Waiver of summons in error. Filed Nov. 13, 1900. D. A. Valentine, clerk supreme court.

144 And be it further remembered, that on the 1st day of December, 1900, the same being one of the regular judicial days of the July, 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice, the Honorable William A. Johnston, and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record as follows, to wit:

145 *Journal Entry of Assignment.*

It is ordered that the following cases be assigned for hearing at the February 1901 session of this court: Title of case. Manley vs. Parks No. 11833 page 11.

146 And afterwards on the 5th day of February A. D. 1901, there was filed in the office of the clerk of the supreme court of the State of Kansas a motion to withdraw the transcript attached to the petition in error and attach to said petition in error a case-made, which motion with the endorsements thereon is in the words and figures as follows, to wit:

147 In the Supreme Court of the State of Kansas.

REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error. } No. 11833.

Motion for Leave to Withdraw Transcript of Record.

Comes now here the plaintiff in error and shows to the court that he originally commenced this proceeding in error by petition in error and transcript of the record of the proceedings of the Atchison county district court. That afterwards he filed the original case-made, and a copy thereof, in the above-entitled cause, in this court, and plaintiff in error now asks that he may be permitted to withdraw said transcript of the record from the files of this court, and substitute therefor said case-made, and correct his petition in error so as to show that a case-made is attached thereto instead of a transcript of the record.

DAVID MARTIN,
L. F. BIRD,
Attorneys for Plaintiff in Error.

(Endorsed on back:) No. 11833 R. M. Manley, ex'r *vs.* Richard A. Park Motion for leave to withdraw transcript &c. David Martin & L. F. Bird att'ys for plaintiff in error. Filed Feb. 5, 1901. D. A. Valentine, clerk supreme court.

148 And be it further remembered, that afterward on the 6th day of February A. D. 1901 the same being one of the regular judicial days of the January, 1901 term of the supreme court of the State of Kansas, the said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice, the Honorable William A. Johnston, and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record as follows, to wit:

149 *Journal Entry of Submission.*

REUBEN M. MANLEY, Ex'r, etc., Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error. } 11833.

This cause comes on to be heard on the petition in error and transcript of the record of the district court of Atchison county; and also comes on to be heard the motion of the plaintiff in error to attach a case-made of the above-entitled case to his petition in error and amend his petition in error instanter by referring therein to said case-made as an exhibit; and thereupon it is ordered that said motion be allowed; and that plaintiff in error be permitted to at-

tach a case-made to his petition in error and to amend the same by reference therein to said case-made as an exhibit thereto; and thereupon after oral argument by H. M. Jackson for the defendant in error said cause is *submitted* on brief of counsel for both parties and taken under advisement by the court.

150 Be it further remembered, that on the 9th day of March A. D. 1901, the same being one of the regular judicial days of the January, 1901 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice, the Honorable William A. Johnston, the Honorable William R. Smith, the Honorable Edwin W. Cunningham, the Honorable Adrian L. Greene, the Honorable Abram H. Ellis, and the Honorable John C. Pollock, justices, the following proceeding was had and remains of record as follows, to wit:

151 *Journal Entry of Decision.*

REUBEN M. MANLEY ET AL., Pl'ffs in Error,
vs.
RICHARD A. PARK, Def't in Error. } 11833.

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be *affirmed*. It is further ordered that the plaintiff in error pay the costs of this case in this court, taxed at $—. And hereof let execution issue.

152 And also on the 9th day of March, A. D. 1901, there was filed in the office of the clerk of the supreme court of the State of Kansas, the syllabus and opinion of said court in this cause, which syllabus and opinion are in words and figures as follows, to wit:

153 REUBEN M. MANLEY, as Executor, etc.,
vs.
RICHARD A. PARK. } No. 11833.

Error from Atchison county. Affirmed.

Syllabus by the Court—Ellis, J.

1. When a court having jurisdiction of the subject-matter and the parties to an action, renders judgment therein and the party aggrieved thereby fails to effect an appeal from such judgment within the time, and in the manner provided by law, such judgment is *res adjudicata* as to all matters necessarily involved in such action, and, therefore, presumably considered by the court, save alone such propositions appearing in the record as relate to the jurisdiction of the court over the subject-matter and parties to such action.

2. In such a case the fact that a proceeding in error from the judgment of the district court was taken to this court, and was here dismissed for non-compliance with the statute will not change the rule as to the conclusiveness of the judgment of the court below.

All the justices concurring.

A true copy.
Attest: —— ——,
Clerk Supreme Court.

154 REUBEN M. MANLEY, as Executor, etc., *v.* RICHARD A. PARK. } No. 11833.

Error from Atchison county.

Statement.

In November, 1895, an action was commenced by the defendant in error against Wm. H. Risk as executor of the last will of George Manley, deceased. The action was founded on certain debentures or bonds issued by the Kansas Trust and Banking Company, of which the decedent was a stockholder, and which was alleged to be an insolvent Kansas corporation, organized to loan money and which had suspended business more than a year previously. The petition also set forth that Manley was a resident of Union county, New Jersey at the time of his decease; that he died testate; that Risk had been designated in the will and had been subsequently duly appointed as executor and trustee of the estate of the decedent by the orphans' court of Union county. Subsequently, in due course and regular form, R. M. Manley was substituted as executor by said orphans' court, and as defendant in the court below, in lieu of Risk, and said Manley, as such executor, filed an answer in said cause, to which reply was made.

The plaintiff sought to charge the defendant, R. M. Manley, as executor, with liability as a stockholder of said insolvent trust company, and the allegations of the petition are formal and voluminous.

An attachment was issued at the time the action was commenced and levied on lands held by the defendant as such executor, and situated in said Atchison county, and service by publication was duly had. The plaintiff's causes of action had not been reduced to judgment against the insolvent corporation which issued said debentures.

155 Afterwards, and on the 13th day of December, 1897, the case was tried to the court, without a jury, and the plaintiff recovered judgment for $2463.07, and an order for the sale of the property attached was made. A motion for a new trial was filed and overruled, and the cause was brought here on a case-made and dismissed, on motion, in this court, without a hearing on the merits. Manley as executor, etc. *v.* Richard A. Park, 61 Kan. 857.

On the 12th day of December, 1899, there was filed in the court below, the mandate and judgment of this court dismissing the petition and proceedings in error, and on May 31, 1900, the defendant filed two motions; one to set aside the judgment theretofore rendered against him in said cause, and the other to withdraw the order of sale which had been issued upon said judgment. In each of said motions it was alleged that the court had no jurisdiction to entertain such suit, to render judgment or to order the property attached to be sold to satisfy the same; that the record in the cause showed that the plaintiff was not a judgment creditor of said insolvent corporation; that the same had not been dissolved by the expiration of the time limit in its charter or by a judgment of dissolution, and that the plaintiff had a special security for the payment of his debts, which he did not allege had been exhausted; that the act of the legislature of Kansas, entitled "An act concerning private corporations," approved March 6, 1883, was unconstitutional; that the suit was prosecuted against the executor of a dead man, and under our constitution and laws the probate court of Atchison county, and not the district court, had jurisdiction; that no attachment could legally issue against the property of the defendant executor; that section 203 of the executors' and administrators' act is unconstitutional and contravenes section 6, article 3, and section 8, article 3 of the constitution of the State of Kansas; and also violates sections 1 and 2 of article 4, and the 14th amendment of the Constitution of the United States, and section 27 of the act of Congress creating the Territory of Kansas; that in rendering said judgment said district court did not give full faith and credit to the public acts and judicial proceedings of the orphans' court of Union county, New Jersey, according to the requirements of the Constitution of the United States, article 4, section 1, and did not accord to the defendant, a citizen of New Jersey, the privileges and immunities of an executor resident in this State, contrary to the United States Constitution, section 4, article 2, and enforced the said section 203 of the executors' and administrators' act of this State, which abridged the privileges of the defendant, and his immunity from suit by attachment and deprived him of his property without due process of law, and denied him the equal protection of the law, contrary to the 14th amendment of the Constitution of the United States.

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These motions were heard together, and overruled. An exception was taken, and, upon a case-made, the order of the court in overruling said motions is brought here for review.

157

REUBEN M. MANLEY, as Executor, etc.,
v.
RICHARD A. PARK. } No. 11833.

Error from Atchison county. Affirmed.

The opinion of the court was delivered by ELLIS, *J.*:

Although several assignments of error were made herein and argued at great length by the learned counsel for the plaintiff in error, the

one question necessary for us to consider in the present status of this case is, was the judgment of December 13, 1897, absolutely void. If it was null and void, it could properly be attacked by the motions, the overruling of which constitutes the grievance now complained of, and if not so void it stands as a final determination of all the matters in controversy in the action in which it was rendered, and as to those matters it is *res adjudicata*. The mere announcement that the defendant voluntarily appeared and plead to the action will suffice to dispose of and determine in the affirmative the question as to whether the court below had jurisdiction of the person of the non-resident defendant. There remains then for our consideration the question as to whether such judgment was void for want of jurisdiction in the court of the subject-matter, or because it was not within the powers granted to the court by the laws of its organization.

The constitution of this State, article 3, section 6, provides that,

"The district courts shall have such jurisdiction in their respective districts as may be provided by law."

And by statute it is enacted that:

"There shall be in each county organized for judicial purposes, a district court, which shall be a court of record, and shall have *general original jurisdiction* of all matters both *civil* and *criminal*, (not otherwise provided by law.)

158 Section 1, chapter 85, General Statutes of 1897.

Surely this grant of power is broad enough to confer jurisdiction, except as to those matters only which by statute are withheld or ceded to another tribunal.

It will be noted that the present case was an action for the recovery of money upon a contractual liability against a foreign executor, and specific authority for the bringing of such an action may be found in section 147, chapter 107, General Statutes of 1897, which is as follows:—

"An executor or administrator duly appointed in any other State or country may sue or be sued *in any court* in this State, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued."

In the case of Cady *v.* Bard, *et al.* 21 Kan. 479, the statute just quoted was construed by this court, and in the opinion Mr. Justice Brewer said:—

"Now, a non-resident may be sued in an action on a contract for the recovery of money, and service may be obtained by attachment and publication. In 'like manner' may a foreign executor or administrator be sued. That a State has jurisdiction over all property within its territorial limits, and may subject it to the process of its courts, will not be doubted. Whether a judgment rendered upon a service by attachment and publication has any extraterritorial force, or binds anything other than the specific property attached, we need not inquire. It is enough for the purposes of this case to hold that jurisdiction may be acquired, so far as may be necessary, to cut off all interest of the non-resident defendant in the property attached."

In the syllabus in that case it was laid down as the law of this State that under the statutory provision just quoted,

"A foreign executor or administrator may be sued in an action on a contract for the recovery of money, and service obtained by attachment and publication." (See also, Denny *v.* Faulkner, 22 Kan. 96; Dunlap *v.* McFarland, 25 Kan. 490; Donifelser *v.* Heyl, 7 Kan. App. 606, affirmed 59 Kan. 779.)

The statutes conferring jurisdiction upon the probate courts of this State do not nullify the provisions of the statute permitting actions to be brought by and against foreign executors and administrators, in the same manner as they may be brought by and against non-residents of the State. It would be idle to cite the various provisions of our constitution and laws relating to the jurisdiction of probate courts in the care of the estates of deceased persons, minors and persons of unsound mind, for, in the view we have taken
159 of this case, it is only necessary for us to determine the question as to whether, under the constitution and laws of this State, the district court of Atchison county had jurisdiction to entertain a suit, like the present, commenced against a non-resident executor by attachment and publication notice.

If a court should assume to act in a case over which the law did not give it authority, the judgment would be altogether void. This would be true whether objection be made to the exercise of unwarranted power on the part of said court or not. But the court "has jurisdiction of any subject matter, if, by the law of its organization, it has authority to take cognizance of, try and determine cases of that description." (Cooley Const. Lim. (6*h*th ed.) 491.)

In Morrow *v.* Weed, 4 Iowa, 77, 89, the court said:—

"The question, then, is, when does jurisdiction arise, *or what gives* jurisdiction? The answer is; first, the law; second, a petition, (or whatever stands in its place); third, notice, (when such is required)."

"It is the character of the suit on the part of a plaintiff which gives the right of jurisdiction to a court, so far as the subject-matter is concerned; and not of the defense thereto. Where a statute grants a right, jurisdiction attaches, even if another statute may make a certain circumstance a bar to that right, if pleaded by the defendant." (Wells on Jurisdiction, sec. 4.)

Another author on the same subject says:—

"Jurisdiction over the subject-matter is the right of the court to exercise judicial power over that class of cases; not the particular case before it, but rather the abstract power to try a case of the kind and character of the one pending; and not whether the particular case is one that presents a cause of action, or under the particular facts is triable before the court it which it is pending, because of some inherent facts which exist and may be developed during the trial." (Brown on Jurisdiction, sec. 1*a*.)

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred." (Cooper *v.* Reynolds, 77 U. S. 308, 316.)

"Jurisdiction of the subject-matter is the court's jurisdiction of
ie cases of a *general class* to which any particular case and the re-
ef sought therein may belong." (12 Encyc. Pl. & Pr. 121, n. 1.
nd cases cited. See also U. S. *v.* Arredondo and others, 6 Pet. 691;
ithian *v.* Monks, 43 Mo. 502; Hunt *v.* Hunt, 72 N. Y. 229; Cook
Bangs, 31 Fed. 640; Florentine *v.* Barton, 69 U. S. 210; Hallock
Downing, 69 N. Y. 240.)

In Donifelser *v.* Heyl, *supra*, which was an action brought by a
oreign executor by attachment against a foreign executrix, on which
udgment was rendered for the plaintiff and the real property at-
tached ordered to be sold to satisfy such judgment, the court,
60 on application of the defendant, opened the judgment and
permitted the foreign executrix to come in and defend, and
fter a trial the court entered an ordinary judgment in favor of the
laintiff and against the defendant as executrix, but refused to
rder the property sold which had been attached. In commenting
pon the statute quoted above, section 147, chapter 107, General
tatutes of 1897, the court said:—

"To hold the statute not broad enough to cover the present case
s to hold it to be so narrow that it covers nothing. What was the
ain to the plaintiff below in obtaining the judgment finally awarded
im? He could not collect it by the ordinary post judgment pro-
ess of the court which rendered it. He would be obliged to wait
oping that something might come to him through the proceedings
f the probate court of Cook county, Illinois."

And in the present case, to hold that the foreign executor might
e sued, that an attachment might issue under which the land
ight be seized, that a service by publication as in ordinary cases
ight be made with like effect, and then to say that after judgment
ad been rendered the particular property seized could not be sold
y the order of the court, would be to decide that the statute itself
as meaningless and afforded to the plaintiff no redress or benefit.

A court acquires jurisdiction of the *res* where there is a substan-
ial compliance with the provisions of law in the bringing of a suit
y attachment; where the writ is issued and the property is actually
eized thereunder, and where such notice as is requisite be given
he defendant.

"Whenever specific property is subject to seizure and sale for the
atisfaction of particular demands, courts of the State where the
roperty is situated have undoubted jurisdiction without reference
o the residence of the party." (12 Encyc. Pl. & Pr. 145, and cases
ited.)

"The rule is that when a party out of the jurisdiction has prop-
rty within the jurisdiction of the court, the jurisdiction of the cause
ay be acquired by issuance of process against and seizure of such
roperty, even though the defendant cannot be served with personal
rocess, but the jurisdiction thus acquired will merely authorize the
scertainment of the obligation and subjection of the property to
he extent thereof if so much is seized, and will not support a per-
onal judgment in the absence of personal service." (*Id.* p. 143, and
ases cited.)

"In proceedings *in rem*, as well as in those which are in the nature of proceedings *in rem*, actual notice to parties is not necessary, but constructive notice, either generally to the whole world where the proceeding is purely *in rem*, or specially to the parties interested where the proceeding is *quasi in rem*, is sufficient." (*Id.* p. 146, and cases cited.)

"That a State has jurisdiction over all property within its territorial limits and may subject it to the process of its courts will not be doubted." (Cady *v.* Bard, *supra*. Also Page Ex'r of
161 Miller *v.* U. S. 78 U. S. 268, 294; The Rio Grande, 90 U. S. 458, 3rd syl.; Arndt *v.* Griggs, 134 U. S. 316.)

It is proper for a court in determining the validity of a statute to take into consideration the question as to whether it has long been following and acquiesced in, without a question as to its constitutionality being raised. In the case at bar, for more than thirty years our statute providing that foreign executors may sue and be sued in any court in this State, in like manner as suits may be brought by and against non-residents generally, has been in force, has been acted upon and construed by our courts, and never before, so far as we are able to ascertain, have its provisions been challenged as repugnant to our own constitution, or to that of the Constitution of the United States. Indeed, the validity of this section was expressly recognized in Eells *v.* Holder, 2 McCrary, 622. As to all of the objections raised in this case, which we have not discussed, it may be said that they must be treated as having been passed upon by the court below. If the court had jurisdiction to render judgment at all, its judgment rendered December 13th, 1897, must be regarded as final, and whether right or wrong it must be upheld. The power to determine and decide a case includes the power to decide it wrong as well as to decide it right. And in this case it must be held that the court below passed upon, and upheld the several statutes not cited in this opinion, which are assailed by counsel for the plaintiff in error, as unconstitutional. We do not discuss them because they do not relate to the jurisdiction of the district court over the parties or the subject-matter herein.

In Florentine *v.* Barton, 69 U. S. *supra*, the validity of an Illinois statute and judgment therein was involved, and the court held that:—

"Whether the decision be correct or otherwise, its judgment, until reversed, is binding on every other court."

Also:—

"The question raised as to the constitutional power of the legislature of Illinois to pass the private acts modifying the general course of proceedings in similar cases, was necessarily decided by the circuit court of the State, under whose order and supervision this sale was made."

162 In Board of Children's Guardians, etc. *v.* Shutter, 139 Ind. 263; S. C. 31 L. R. A. 740, the court said:—

"A judgment founded on a statutory bond, depending for its validity wholly on the statute, which is unconstitutional and void, is not void, and cannot be collaterally impeached because the statute is unconstitutional and void."

Thereupon the court disposed of the case, as it said, "without de-
ling anything whatever about the constitutionality of the statute
ably and exhaustively discussed." (See also, C. & A. Rld. Co. *v.*
iggins Ferry Co. 108, U. S. 18.)

In *Ex parte* Tobias Watkins, 3 Peters, 193, 202, the court said of
e judgment rendered by a court having jurisdiction:—

"A judgment, in its nature, concludes the subject on which it is
dered, and pronounces the law of the case. The judgment of a
urt of record whose jurisdiction is final, is as conclusive on all the
rld as the judgment of this court would be. It is as conclusive on
is court as it is on other courts."

"When any tribunal has jurisdiction of the subject-matter of and
e parties to any controversy, and renders a judgment thereon, such
dgment is conclusive between the parties. If the rulings of that
bunal are adverse to one party, and wrong, he should seek to cor-
et that judgment by error or appeal. Failing to do that, he is es-
pped from further inquiry." (Anthony *v.* Halderman, 7 Kan. 50,
.)

"The estoppel is not confined to the judgment, but extends to all
ets involved in it as necessary steps or the ground-work upon which
must have been founded." (Burlen *v.* Shannon, 99 Mass. 200, 203;
oted and approved in U. S. *v.* Co. Ct. Knox Co. 122 U. S. 306.)

Even though the petition was defective,

"If the petition sets forth facts sufficient to challenge the attention
the court with regard to its merits or authorize the court to de-
erate with respect thereto, then the judgment subsequently ren-
red upon it is not void, but at most is only voidable, and it cannot
en then be held to be voidable except when it is attacked directly
d in a direct proceeding." (Head *v.* Daniels, 38 Kan. 1, 6; Greer
Adams, 6 Kan. 203; Rowe *v.* Palmer, 29 Kan. 337; Entreken *v.*
oward, 16 Kan. 531; Bryan *v.* Bander, 23 Kan. 95.)

It follows that if, as to any of the rulings and decisions made by
e court below upon matters not directly involving its power and
risdiction to entertain the suit and render judgment therein, the
fendant below was aggrieved, he had but one remedy therefor—
at of appeal within the time and in the manner provided by law.
The fact that the appeal in this case was dismissed does not change
e result, and the judgment must be regarded as final after the ex-
piration of the time in which an appeal is allowed by law.
3 (Wells Res. Adj. sec. 9.)

We conclude, therefore, that the court below was invested
th the power to hear and determine this case; that it had juris-
ction of the parties and the subject-matter, and that its judgment
dered December 13, 1897, is final and conclusive.

For which reason the decision and judgment of the court below in
erruling the aforesaid motions, must be affirmed.

All the justices concurring.

A true copy.

Attest: ——— ———,
Clerk Supreme Court.

7—120

164 And afterward on the 4th day of May, 1901, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition for a writ of error, which with the endorsements thereon is in the words and figures as follows, to wit:

165 In the Supreme Court of the State of Kansas.

REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error.
} No. 11833.

Petition for Writ of Error.

Now comes Reuben M. Manley, executor of the estate of George Manley, deceased, plaintiff in error herein, and says that on or about the 8th day of March, A. D. 1901, this court rendered and entered judgment herein, in favor of the defendant in error, Richard A. Park, and against this plaintiff in error, Reuben M. Manley, executor of the estate of George Manley, deceased, in which judgment and the proceedings had prior thereto in said cause certain errors were committed, to the prejudice of this plaintiff in error, Reuben M. Manley, executor of the estate of George Manley, deceased; all of which will more in detail appear from the assignment of errors which is filed with this petition for a writ of error.

Wherefore, this plaintiff in error, Reuben M. Manley, executor of the estate of George Manley deceased, prays that a writ of error may be allowed in this behalf to the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the records, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

L. F. BIRD,
Attorney for Reuben M. Manley, Executor of the Estate of George Manley, Deceased, Plaintiff in Error.

166 [Endorsed:] No. 11,833. Reuben M. Manley, executor, vs. Richard A. Park. Petition for writ of error. Filed May 4 1901 D. A. Valentine, clerk supreme court. L. F. Bird, att'y for plaintiff in error, Reuben M. Manley, executor.

167 Be it further remembered, that on the said 4th day of May, A. D. 1901, the same being one of the regular judicial days of the January, 1901 term of the supreme court of the State of Kansas, before the Honorable Frank Doster, chief justice of the said court at his chambers in the city of Topeka, the following proceeding was had and remains of record as follows, to wit:

168 *Journal Entry Allowing Writ of Error.*

REUBEN M. MANLEY, Ex'r, &c., Pl'ff in Error,
vs.
RICHARD A. PARK, Def't in Error. } 11833.

Now on this 4th day of May A. D. 1901, comes Reuben M. Manley executor of the estate of George Manley, deceased, plaintiff in error, and presents to the undersigned, chief justice of the supreme court of the State of Kansas, his petition herein praying for the allowance of a writ of error in the above-entitled cause to the Supreme Court of the United States, for the correction of certain errors complained of and more fully set forth in the assignment of errors accompanying said petition for a writ of error.

Upon consideration whereof it is hereby ordered that the said petition be and the same is hereby granted, and the said writ of error allowed. The plaintiff in error thereupon produces his supersedeas bond on the said writ of error in the sum of $1000.00, with James H. Spalding as surety.

Upon consideration whereof the said bond and the sufficiency of the sureties thereon are hereby approved by me.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

169 And also on the 4th day of May A. D. 1901, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error which with the endorsements thereon is in words and figures as follows, to wit:

170 In the Supreme Court of the State of Kansas.

REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error. } No. 11833.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme judicial court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme judicial court of the State of Kansas, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Reuben M. Manley, executor of the estate of George Manley, deceased, plaintiff in error, and Richard A. Park, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under,

the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of — commission held under the United States, and the decision was against the title, right, privilege, and exemption specially set up or claimed under such *claim* of said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of said Reuben M. Manley, executor of the estate of George Manley, deceased, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United
171 States, together with this writ, so that you have the same at Washington on a day not exceeding thirty days from the 4th day May, 1901, in the office of the clerk of the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 4 day of May in the year of our Lord one thousand nine hundred and one.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

GEO. F. SHARTT,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed this May 4", 1901.

FRANK DOSTER,
Chief Justice Kansas.

172 [Endorsed:] No. 11,833. Reuben M. Manley, executor, etc. *vs.* Richard A. Park. Writ of error. Filed May 4 1901 D. A. Valentine, clerk supreme court.

173 And also on the 4th day of May A. D. 1901, there was filed in the office of the clerk of the supreme court of the State of Kansas, an assignment of errors, which with the endorsements thereon is in words and figures as follows, to wit:

174 The Supreme Court of the United States, of October Term, in the Year of Our Lord One Thousand Nine Hundred and One.

REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error. } No. —.

Assignment of Errors.

Reuben M. Manley, executor of the estate of George Manley, deceased, plaintiff in error, in connection with his petition for a writ of error, says that in the record and proceedings in said cause there is manifest error in the particulars following, to wit:

1. That Richard A. Park, as plaintiff, commenced his action against William H. Risk, executor of the estate of George Manley, deceased, as defendant, in the district court of Atchison county, Kansas, by attachment and on the ground that the defendant was a non-resident of the State of Kansas; that Reuben M. Manley, succeeded the said William H. Risk, as executor of said estate, and said action was revived against him; that on December 13, 1897, judgment was rendered in said action in favor of the plaintiff therein, Richard A. Park, and against the defendant therein, Reuben M. Manley, executor of the estate of George Manley, deceased, for $2,463.07, with interest at the rate of six per cent. per annum and costs of suit, and certain real property of said defendant therein so attached was ordered sold to satisfy said judgment and costs; that on May 31, 1900, the defendant in said suit, Reuben M. Manley, executor of the estate of George Manley, deceased, filed his motion in the said district court of Atchison county, Kansas, to set aside the said judgment, and also his motion to set aside the order and judgment of said court ordering the property attached in said action to be sold to satisfy said judgment, for that the said district court of Atchison county, Kansas, had no jurisdiction to entertain said suit, or to render judgment therein, or
175 to order the property attached therein to be sold to satisfy said judgment; that said action was a suit against the executor of the estate of a dead man, and under the constitution and laws of the State of Kansas, the probate court of Atchison county, Kansas, and not the district court of Atchison county, Kansas, had jurisdiction to entertain the claim of the plaintiff; that no attachment could legally issue against the property of the defendant executor, and the said district court of Atchison county, Kansas, in rendering said judgment, and in ordering the sale of said attached property did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the orphans' court of Union county, New Jersey, where the estate of George Manley, deceased, was being administered, and did not accord to the defendant, a citizen of the State of New Jersey, all the privileges and immunities

of an executor resident in the State of Kansas, as guaranteed by art. 4, secs. 1 and 2 of the Constitution of the United States, but abridged the privileges of the defendant and deprived him of his property without due process of law, guaranteed him by the fourteenth amendment to the Constitution of the United States. That on June 2, 1900, said motions were heard and were each overruled by the district court of Atchison county, Kansas, and by due proceedings therefor said matter and cause were taken on error to the supreme court of the State of Kansas, and on March 9, 1901, said supreme court of the State of Kansas, by its decision and judgment affirmed the decision and judgment of the said district court of Atchison county, Kansas. And the supreme court of the State of Kansas erred in affirming the decision and judgment of the district court of Atchison county, Kansas, in refusing to set aside said judgment.

II. The supreme court of the State of Kansas erred in affirming the decision and judgment of the district court of Atchison county, Kansas, in refusing to set aside the said order and judgment ordering the property, attached in said action to be sold to satisfy said judgment.

III. The supreme court of the State of Kansas, erred in that it did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the orphans' court of Union county, New Jersey, where the estate of George Manley, deceased, was being administered, as required by section 1 of art. 4 of the Con-
176 stitution of the United States, in that it decided that the property of the estate of George Manley, deceased, and of Reuben M. Manley, the executor of said estate could be attached in an action for debt brought in the district court of Atchison county, Kansas, against the executor of said estate by attachment, and that said property so, attached could be sold to satisfy said judgment.

IV. The supreme court of the State of Kansas erred in that it did not accord the defendant, in said suit, the plaintiff in error herein, a citizen of the State of New Jersey, all of the privileges and immunities of an executor resident in the State of Kansas, as guaranteed by section 2 of art. 4, of the Constitution of the United States, in that it decided that the property of the estate of George Manley, deceased, and of Reuben M. Manley, the executor of said estate, could be attached in an action for debt brought in the district court of Atchison county, Kansas, against the executor of said estate, and that said property so attached could be sold to satisfy said judgment, when the property of an executor, resident in the State of Kansas, was not subject to attachment process and could not be ordered sold to satisfy a judgment for debt by execution or order of sale on proceedings by attachment, and discriminated against him in that regard solely because he was a non-resident of the State of Kansas.

V. The supreme court of the State of Kansas erred in that it enforced a law or laws of the State of Kansas, which abridged the privileges and immunities of the defendant in said suit, the plaintiff in error herein, and citizen of the United States, and deprived him

of his property without due process of law, and denied him the equal protection of the laws, guaranteed him by the fourteenth amendment to the Constitution of the United States, in that it decided that the property of the estate of George Manley, deceased, and of Reuben M. Manley, the executor of said estate, could be attached in an action for debt brought in the district court of Atchison county, Kansas, against the executor of said estate, and that the property so attached could be ordered sold to satisfy said judgment, when the property of an executor, resident in the State of Kansas, was not subject to attachment process and could not be ordered sold to satisfy a judgment for debt by execution or
177 order of sale on proceedings by attachment, and discriminated against him in that regard solely because he was a non-resident of the State of Kansas.

VI. The supreme court of the State of Kansas erred, in that it decided that the rights of the defendant in said suit, the plaintiff in error herein, were concluded by the judgment of the district court of Atchison county, Kansas, rendered on December 13, 1897, because said judgment was void on its face for the reason that it was rendered against an executor of an estate, and because the property of a dead man was ordered sold to satisfy an ordinary judgment in attachment proceedings rendered against the executor of said estate, and said judgment was rendered and order of sale of attached property made solely because the executor of said dead man was a non-resident of the State of Kansas, and said judgment and order of sale of attached property would have been void if given and made against an executor resident of the State of Kansas, thereby depriving said non-resident executor of his privilege of administering said estate under the orders of the surrogate of the orphans' court of Union county, New Jersey, and of the probate court of Atchison county, Kansas, and of his immunity from suits in the district court of Atchison county, Kansas, by attachment, and depriving him of his property without due process of law and denying him the equal protection of the laws.

And the said Reuben M. Manley, executor of the estate of George Manley, deceased, plaintiff in error, prays that said judgment of the supreme court of the State of Kansas, may be reversed, annulled, and altogether held for naught, and that the plaintiff in error be restored to all things which he hath lost by occasion of said judgment, and for costs of suit.

L. F. BIRD,
Attorney for Plaintiff in Error.

178 [Endorsed:] 11833. Reuben M. Manley, executor &c *vs.* Richard A. Park. Assignment of errors. Filed May 4 1901 D. A. Valentine clerk supreme court. L. F. Bird att'y for plaintiff in error.

179 And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas a supersedeas bond which with the approval thereof and the endorsements thereon is in words and figures as follows, to wit:

180 In the Supreme Court of the State of Kansas.

REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error. } No. 11833.

Supersedeas Bond.

Know all men by these presents that we, Reuben M. Manley, executor of the estate of George Manley, deceased, of the county of Union, State of New Jersey, and James A. Spalding of the county of Atchison, State of Kansas, as surety, are held and firmly bound unto Richard A. Park, of the county of Atchison, State of Kansas, in the full and just sum of one thousand dollars, to be paid to the said Richard A. Park, his heirs, executors, administrators and assigns; for which payment, well and truly to be made, we bind ourselves, jointly and severally, and our heirs, successors, executors, administrators and assigns, firmly by these presents, upon the following conditions, to wit:

Whereas on or about the 9th day of March, A. D. 1901, in a suit depending in the supreme court of the State of Kansas, between said Reuben M. Manley, executor of the estate of George Manley, deceased, plaintiff in error, and Richard A. Park, defendant in error, judgment was rendered against said plaintiff in error, affirming the decision and judgment of the district court of Atchison county, Kansas, and

Whereas, the said plaintiff in error, has obtained a writ of error in the said court to reverse the judgment in the aforesaid suit, and a citation to the said defendant in error, citing and admonishing *them* to be and appear in the Supreme Court of the United States, at the city of Washington;

Now, the condition of the above obligation is such that if the said Reuben M. Manley, executor of the estate of George Manley,
181 deceased, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, otherwise to remain in full force and effect.

Signed with our hands and dated this 4 day of May, 1901.

REUBEN M. MANLEY,
Executor, &c.,
By L. F. BIRD, *His Attorney.*
J. A. SPALDING.

The above bond approved by me this 4th day of May, A. D. 1901.

FRANK DOSTER,
Chief Justice.

STATE OF KANSAS, } ss:
Shawnee County, }

James A. Spalding, of lawful age, on his oath deposes and says: That he is a citizen of the State of Kansas, and resides in Atchison county in said State. That he is worth in real estate in Atchison county, Kansas, the full sum of $9,000.00 over and above all his debts, liabilities and exemptions, and that he is worth in real and personal property in said Atchison county, Kansas, the full sum of twelve thousand dollars.

J. A. SPALDING.

Subscribed and sworn to before me this 4th day of May A. D. 1901.

H. L. ARMSTRONG,
[SEAL.] *Deputy Clerk Supreme Court.*

Endorsed on back: Reuben M. Manley, executor *vs.* Richard A. Park. No. 11,833 Supersedeas bond. Filed May 4 1901 D. A. Valentine clerk sup. court.

182 And afterwards, on the 23rd day of May, A. D. 1901 there was filed in the office of the clerk of the supreme court of the State of Kansas a citation which together with the proof of the service of the same and the endorsements thereon is in the words and figures as follows, to wit:

183 UNITED STATES OF AMERICA, *ss:*

To Richard A. Park:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Kansas, in a cause wherein Reuben M. Manley, executor of the estate of George Manley, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4" day of May, A. D. 1901.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Service of the foregoing citation hereby acknowledged to the same effect as if duly served by an officer this 7" day of May A. D. 1901.

H. M. JACKSON,
JACKSON & JACKSON,
Attorneys for Richard A. Park, Defendant in Error.

[Endorsed:] No. 11,833. Reuben M. Manley, executor, *vs.* Richard A. Park. Citation. Filed May 23, 1901. D. A. Valentine, clerk supreme court.

184 In the Supreme Court of the State of Kansas.

REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error. } No. 11833.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleading- and papers filed and all proceedings had in the above-entitled cause, as the same now remain on file and appear of record in my office.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 23d day of May, A. D. 1901.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

185 In the Supreme Court of the State of Kansas.

REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error. } No. 11833.

Pursuant to a writ of error issued out of the United States circuit court for the district of Kansas on the 4th day of May A. D. 1901, and directed to the supreme court of the State of Kansas, and in obedience to the command thereof, I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do herewith transmit to the Supreme Court of the United States a duly certified transcript of the record, and proceedings of this court, in the within-entitled cause, with all things concerning the same.

Seal Supreme Court, State of Kansas.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 1st day of June A. D. 1901.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

186 In the Supreme Court of the United States, October Term, 1902.

REUBEN M. MANLEY, Ex'r, etc., Plaintiff in Error,
vs.
RICHARD A. PARK, Defendant in Error. } No. 120.

Stipulation.

It is hereby stipulated and agreed that in printing the record in the above-entitled action, the "transcript of the record," that is, such part of the record from the supreme court of the State of Kansas as was filed in said court June 25th and which ends with the certificate of J. N. Cox, clerk of the district court of Atchison county, Kansas of date June 22nd, 1900, may be omitted, leaving the part to be printed the petition in error filed in the supreme court of the State of Kansas June 25th, 1900 and case-made filed in the supreme court of the State of Kansas August 8th, 1900.

L. F. BIRD,
C. F. HUTCHINGS,
Attorneys for Plaintiff in Error.
JACKSON & JACKSON,
Attorneys for Defendant in Error.
HORACE M. JACKSON,
Of Counsel.

[Endorsed:] Reuben M. Manley ex'r, etc., pl'ff in error, *vs.* Richard A. Park, def't in error. Stipulation.

187 [Endorsed:] File No. 18,207. Supreme Court U. S. October term, 1902. Term No. 120. Reuben M. Manley, executor of George Manley, dec'd, P. E. *vs.* Richard A. Park. Stipulation of counsel omitting part of record in printing. Filed July 11", 1902.

Endorsed on cover: File No. 18,207. Kansas supreme court. Term No. 120. Reuben M. Manley executor of the estate of George Manley, deceased, plaintiff in error, *vs.* Richard A. Park. Filed June 25", 1901.

Office Supreme Court U. S.
FILED
NOV 4 1902
JAMES H. McKENNEY,
Clerk.

No. 120.

Brf. of Hutchings for P. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1902.

Filed Nov. 4, 1902. NO. 120.

REUBEN M. MANLEY, EXECUTOR OF THE ESTATE OF GEORGE MANLEY, DECEASED, PLANITIFF IN ERROR,

VS.

ANNA O. PARK, SUBSTITUTED FOR RICHARD A. PARK, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Brief of Plaintiff in Error, in Opposition of Motion of Defendant in Error to Dismiss or Affirm, and Brief of Plaintiff in Error on the Merits.

L. F. BIRD,
Attorney for Plaintiff in Error.

C. F. HUTCHINGS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1902.

NO. 120.

REUBEN M. MANLEY, EXECUTOR OF THE ESTATE OF GEORGE MANLEY, DECEASED, PLANITIFF IN ERROR,

VS.

ANNA O. PARK, SUBSTITUTED FOR RICHARD A. PARK, DECEASED, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Brief of Plaintiff in Error, in Opposition of Motion of Defendant in Error to Dismiss or Affirm, and Brief of Plaintiff in Error on the Merits.

STATEMENT OF THE CASE.

On November 4, 1895, the defendant in error, as plaintiff, brought suit in the District Court of Atchison County, Kansas, against William H. Risk, executor of the estate of George Manley, deceased, and in his petition said plaintiff

alleged the death of George Manley at the County of Union, State of New Jersey, on December 30, 1891, and that at the time of his death he was a resident and citizen of said county and state. That at the time of his decease he was the owner and holder of shares of stock in The Kansas Trust and Banking Company to the extent of $27,500. That he died testate, and by his last will and testament nominated and appointed Reuben M. Manley and William H. Risk, as the executors of and trustees under said last will and testament. That on January 22, 1892, said last will and testament was duly admitted to probate in the Orphans' Court of said Union County, New Jersey, and letters testamentary were duly issued to William H. Risk, one of said executors and trustees, and thereon, and on said day, said William H. Risk duly accepted such trust and qualified as such executor and trustee, and as such executor and trustee became seized and possessed of all the property of said George Manley, deceased, lying and situate in the State of Kansas.

That under and by virtue of said ownership of such shares of stock by said George Manley, and the making of said will and the probate thereof, and the appointment of William H. Risk as executor, said defendant, William H. Risk, executor of said estate of George Manley, deceased, became and is a stockholder of said The Kansas Trust and Banking Company, a corporation organized and incorporated under the laws of the State of Kansas, other than for railroad, religious or charitable purposes, and as such ex-

ecutor of such estate is the owner and holder of shares of stock of said corporation amounting to the sum of $27,500, and that said corporation was wholly insolvent and had no means or property out of or from which said indebtedness so due to the plaintiff, as creditor, could be collected.

That plaintiff was the owner and holder of certain debenture bonds issued by said The Kansas Trust and Banking Company, aggregating the sum of $2,000, and was a creditor of said corporation, and that said corporation had suspended business for more than one year prior to the filing of said petition, and had not since engaged in the transaction of any business whatever. And plaintiff demanded judgment for the amount of said debenture bonds, with the interest due thereon and costs of suit. (Transcript of Record, pp. 5 to 13.)

Summons was issued in said action, directed to the sheriff of Atchison County, Kansas, for service and return, and was on November 8, 1895, returned by him non est. (Transcript of Record, pp. 15 and 16.)

On the affidavit of the plaintiff therefor, and on the single ground that the defendant was a non-resident of the state (Transcript of Record, p. 14), an order of attachment was issued in said cause, and real property of the defendant attached (Transcript of Record, pp. 16 and 17), and thereafter service was had on the defendant by publication. (Transcript of Record, pp. 17 and 18.)

On March 29, 1897, said action was duly revived against R. M. Manley, executor of the estate of George

Manley, deceased, and successor of said William Risk, executor (Transcript of Record, pp. 20 and 21), and plaintiff filed his supplemental petition in said cause setting up such revivor. (Transcript of Record, p. 21.)

On November 8, 1897, said defendant filed his answer in said cause in which he admitted that George Manley died at Union County, New Jersey, on December 30, 1891, being at the time of his death a resident and citizen of Union County, New Jersey, and that at the time of his death said George Manley, deceased, was the owner and holder of shares of stock in The Kansas Trust and Banking Company, amounting to the sum of $27,500; that he died testate, and in his last will and testament designated Reuben M. Manley and William H. Risk as the executors of, and trustees under, the same; that on January 22, 1892, said last will and testament was duly admitted to probate in the Orphans' Court of Union county, New Jersey, and letters testamentary were duly issued to William H. Risk, one of said executors and trustees, and on said day William H. Risk duly accepted said trust and qualified as such executor and trustee, and thereby said William H. Risk, as such executor, became seized and possessed of all of the property of said George Manley, deceased, situate in the State of Kansas; that on July 15, 1896, letters testamentary were duly issued to said Reuben M. Manley, the other of said executors and trustees, by the Orphans' Court of Union county, New Jersey, and on said day said Reuben M. Manley duly accepted said trust, and qualified as such executor

and trustee; that on January 23, 1897, said William H. Risk was by the Orphans' Court of Union county, New Jersey, duly relieved and discharged as such executor and trustee, and thereby said Reuben M. Manley, as such executor, became seized and possessed of all of the property of said George Manley, deceased, situate in the State of Kansas; that the defendant was the owner and holder of shares of stock in the said The Kansas Trust and Banking Company, amounting to the sum of $27,500, and that the plaintiff was a creditor of The Kansas Trust and Banking Company, in the amount, and on account of the debenture bonds, set out in the petition of the plaintiff, and said defendant denied each and every statement, allegation and averment in said petition of the plaintiff, excepting as so admitted. (Transcript of Record, pp. 22 and 23.)

On November 10, 1897, plaintiff filed his reply to said answer, and which said reply was a general denial, and further alleged that said George Manley at the time of his death, and long prior thereto, was not a citizen of the State of Kansas, and was not within said State of Kansas, and that said William H. Risk and Reuben M. Manley were neither of them residents within nor citizens of the State of Kansas, at any time after the appointment of them, respectively, as executors of the estate of George Manley, deceased, nor were they, or either of them, within the said State of Kansas after their respective appointments as executor, but were continuously out of and beyond the said State of Kansas. (Transcript of Record, p. 26.)

On December 13, 1897, said cause was tried to the court without a jury, a jury trial having been waived, and the court rendered judgment in favor of the plaintiff and against the defendant for the sum of $2,463.07, with interest and costs, and ordered the property attached in said action sold to satisfy the same. (Transcript of Record, p. 29.)

On December 15, 1897, said defendant filed his motion for a new trial (Transcript of Record, p. 30), which was by the court on June 7, 1898, overruled. (Transcript of Record, p. 31.)

On December 12, 1899, there was filed in said cause the mandate and judgment of the Supreme Court dismissing the proceeding in error and petition in error of said defendant, as plaintiff in error, to reverse the judgment in said cause. (Transcript of Record, p. 34.)

On May 31, 1900, the said defendant filed in said court and cause his motion to set aside the judgment in said cause, and also the order and judgment of the court ordering the property attached therein to be sold to satisfy said judgment, for the following reasons, to-wit:

First: For that the court had no jurisdiction to entertain said suit, and to render judgment therein, and to order the property attached therein sold to satisfy said judgment.

Second. For that the plaintiff was not a judgment creditor of The Kansas Trust and Banking Company, and said company had not been dissolved by the expiration of the time limited in its charter or by a judgment of dissolution rendered by a court of competent jurisdiction; that the

plaintiff had a special security for the payment of the debenture bonds sued on, and the petition of the plaintiff did not allege that said special security had been exhausted, and that the act of the legislature of the State of Kansas, entitled, "An act concerning private corporations," approved March 6, 1883, and on which the action of the plaintiff was grounded and based, was unconstitutional and void, and in conflict with Sec. 16, Act 2, of the constitution of the State of Kansas.

Third. For that said action was a suit against the executor of the estate of a dead man, and under the constitution and laws of the State of Kansas, the Probate Court of Atchison county, Kansas, and not the District Court of Atchison county, Kansas, had jurisdiction to entertain the claim of the plaintiff. That no attachment could legally issue against the property of the defendant executor, and the said District Court in rendering said judgment and in ordering the sale of said attached property did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the Orphans' Court of Union county, New Jersey, where the estate of George Manley, deceased, was being administered, and did not accord to the defendant, a citizen of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas, as guaranteed by Art. 4, Secs. 1 and 2, of the constitution of the United States, but abridged the privileges of the defendant and deprived him of his property without due process of law, guaranteed him by the fourteenth

amendment to the constitution of the United States. (Transcript of Record, pp. 35 and 36.)

On May 31, 1900, the said defendant filed in said court and cause his motion to withdraw the order of sale issued in said cause for the same reasons as stated in said motion to set aside said judgment. (Transcript of Record, pp. 37 and 38.)

On June 2, 1900, said motions were heard by the court on the pleadings, files and journal entries in said cause, as set out above, and the order of sale issued in said cause, and were each by the court overruled, defendant excepting (Transcript of Record, pp. 38 and 39), and by due proceedings therefor, said defendant, as plaintiff in error, prosecuted his proceeding in error in the Supreme Court of the State of Kansas to reverse the decision and judgment of said court overruling said motions.

On March 9, 1901, the Supreme Court of the State of Kansas "ordered and adjudged that the judgment of the court below be affirmed" (Transcript of Record, p. 42), and also filed its written opinion in said cause in which it held that the Atchison county District Court having jurisdiction of the subject matter and of the parties to the said action, and having rendered its judgment in said action of December 13, 1897, and the defendant therein, the plaintiff in error herein, having failed to effect an appeal from said judgment within the time, and in the manner provided by law, said judgment was res adjudicata as to all matters necessarily involved in said action, and therefore, presumably consider-

ed by the court, save alone said propositions appearing in the record as relate to the jurisdiction of the court over the subject matter and the parties to said action. (Transcript of Record, p. 42.)

In the written opinion of the Supreme Court of the State of Kansas, the federal rights claimed by the plaintiff in error, were fully set forth in the following language, to-wit:

"In each of said motions it was alleged that the court had no jurisdiction to entertain such suit, to render judgment or to order the attached property to be sold to satisfy the same; * * * * that the suit was ~~presented~~ prosecuted against the executor of a dead man, and under our constitution and laws the Probate Court of Atchison county, and not the District Court, had jurisdiction; that no attachment could legally issue against the property of the defendant executor; that section 203 of the executors' and administrators' act is unconstitutional and contravenes section 6, article 3, and section 8, article 3, of the constitution of the State of Kansas; and also violates sections 1 and 2 of article 4, and the 14th amendment to the constitution of the United States, and section 27 of the act of congress creating the Territory of Kansas; that in rendering said judgment said District Court did not give full faith and credit to the public acts and judicial proceedings of the Orphans' Court of Union county, New Jersey, according to the requirements of the constitution of the United States, article 4, section 1, and did not accord to the defendant, a citizen of New Jersey,

the privileges and immunities of an executor resident in this state, contrary to the United States constitution, article 4, section 2, and enforced the said section 203 of the executors' and administrators' act of this state, which abridged the privileges of the defendant, and his immunity from suit by attachment and deprived him of his property without due process of law, and denied him the equal protection of the law, contrary to the14th amendment to the constitution of the United States." (Transcript of Record, p. 44.)

And the Supreme Court of the State of Kansas held in its written opinion, that the one question necessary to be considered and decided was as to whether or not the judgment of December 13, 1897, was absolutely void. That if it was null and void, it could properly be attacked by the motions, the overruling of which constituted the grievance complained of, and if it was not so void it stands as a final determination of all the matters in controversy in the action in which it was rendered, and as to these matters it was res adjudicata. (Transcript of Record, p. 43.)

The court further held that the defendant, the plaintiff in error herein, having voluntarily appeared and plead to the action, the court had jurisdiction of his person, and by Sec. 147, Ch. 107, G. S. Kas. 1897 (Sec. 203 of the executors' and administrators' act of 1868), the defendant being a non-resident executor, jurisdiction over the property in his charge could be obtained by attachment of such property (Transcript of Record, p. 45), and the property so attached could be ordered sold to pay the judgment in said

attachment suit. And the court expressly held that section 203 of the executors' and administrators' act was constitutional as applied to a non-resident executor, the court saying:

"In the case at bar, for more than thirty years our statute providing that foreign executors may sue and be sued in any court of this state, in like manner as suits may be brought by or against non-residents generally, has been in force, has been acted upon and construed by our courts (referring to cases of Cady vs. Bard, 21 Kas. 479, and Donifelser vs. Heyl, 7 Kas. App. 606, affirmed in 59 Kas. 779), and never before, as far as we are able to ascertain, have its provisions been challenged as repugnant to our own constitution, or to that of the constitution of the United States. Indeed, the validity of this section was expressly recognized in Eells vs. Holder, 2 McCreary 622." (Transcript of Record, p. 48.)

On May 4, 1901, the plaintiff presented his petition for a writ of error, with the assignment of errors filed therewith, which was allowed by the Chief Justice of that court (Transcript of Record, pp. 50 and 51), and on the same day the writ of error issued and was allowed by the chief justice of the Supreme Court of Kansas. (Transcript of Record, pp. 51 and 52.)

In the said assignment of errors the claims of federal right of the plaintiff in error were fully set forth (Transcript of Record, pp. 53 to 55), and are set out at length on page 33 of this brief.

On May 4, 1901, plaintiff in error duly gave the required supersedeas bond (Transcript of Record, p. 56), and filed in the Supreme Court of Kansas a citation for the defendant in error, Richard A. Park, with proof of service of the same (Transcript of Record, p. 57), and this case by due proceedings therefor was brought to and filed in this court.

Since the record was filed in this court, Anna O. Park has filed suggestion of the death of the defendant in error, Richard A. Park, and a motion has been filed by said Anna O. Park to be substituted as defendant in error herein.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION OF MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

We will discuss the claims of the defendant in error in the order in which they are made.

I.

"THE ATTEMPT TO RAISE THE CLAIMED FEDERAL JUESTION WAS MADE TOO LATE."

The defendant in error contends that a claim of federal right cannot be made after the final decision and on supplementary motions presented after the first appeal. There is no true ground for any such contention in the decisions of this court, and none of the decisions cited by the defendant in error sustain any such contention.

An examination of the cases cited by the defendant in error will show that they do not support any such contention.

In Schudder vs. Coler, 175 U. S. 32, 36, the federal question was not raised until after the case had been finally decided by the Court of Appeals of the State of New Jersey, the highest court of the state.

In Turner vs. Richardson, 180 U. S. 87, the federal right was raised in a petition for a rehearing made in the case after the Supreme Court of Louisiana had given judgment therein.

In Eastern Bldg. & Loan Assn. vs. Welling, 181 U. S. 47, the federal question was raised on motion for a rehearing filed after the Supreme Court of South Carolina had

decided the case and it had been remitted to the trial court.

In Meyer vs. City of Richmond, 172 U. S. 82, 92, Justice Kenna, in deciding the case, said:

"It has been repeatedly decided by this court that to suggest or set up a federal question for the first time in a petition for a rehearing in the highest court of the state is not in time (citing cases)."

But he added:

"In all of these cases (where a federal question is set up for the first time in a petition for a rehearing in the highest court of the state), the federal question was not presented in any way to the lower court, nor to the higher court until after judgment. It is not, therefore, decided that a presentation to the lower court at some stage of the proceedings, and in accordance with its procedure, and a presentation to the higher court before judgment, would not be sufficient."

In Zazoo & M. V. R. Co. vs. Adams, 180 U. S. 1, 7, the federal question was not set up until after the case had been decided by the Supreme Court of the State of Mississippi, and remanded to the lower court for a new trial, and it was raised by new pleas filed without the leave of court, which the state practice required.

The case of Union Mut. Life Ins. Co. vs. Kirchoff, 169 U. S. 103, is discussed at length by the court in Zazoo & M. V. R. Co. vs. Adams, 180 U. S. 1, 7. In the Kirchoff case this court dismissed the writ of error, holding that, as the state Supreme Court refused to reopen the case

as to matters previously adjudicated on a former appeal, as it had a right to do under the state practice, and as the federal question was not set up upon the first appeal, there was no action of the state Supreme Court in relation to it which the Supreme Court of the United States was called upon to revise.

In each of the two last cases the unsuccessful party was caught on a question of practice, or to use the phraseology of the old law writers, was empaled on one of the spears with which Justice guards her portals.

In this case the claim of federal right was raised in the Supreme Court of the state, if not before that, and was decided by that court, and that is all that is required.

In Sully vs. American National Bank, 178 U. S. 209, the claim of federal right was identical with the claim at bar. It was first raised in the Supreme Court of the state, but that was held to be in time.

In that case Justice Peckham, in delivering the opinion of the court, said (page 298):

"In regard to the objection that even Carhart has raised the question too late, we think it is without foundation. He raised it in the Supreme Court, and that court decided it against him, not on the ground that he had not raised it in the lower court, but on its merits, and for the reason that in the judgment of the Supreme Court the statute was a valid and constitutional exercise of the legislative powers of the state."

In Consolidated Coal Co. vs The People, 185 U. S.

203, the claim of federal right was first asserted in a motion in arrest of judgment, and it was held that a denial of such motion presented a federal question which it was the duty of this court to review, although the state Supreme Court in affirming the judgment of the trial court did not in terms pass upon the federal constitutionality of the law.

In Endowment & Benev. Assn. of Kansas vs. Kansas, 120 U. S. 103, the question of the constitutionality of Ch. 13, S. L. Ks. 1885, was first presented in a motion for a new trial in the District Court.

In Clark vs. Pennsylvania, 128 U. S. 395, the federal right was first claimed in certain instructions which were refused by the court.

In Kennebec R. Co. vs. Portland R. Co., 81 U. S. (14 Wall.) 23, it did not appear clearly from the pleadings or decree, or other proceedings in the case, that a federal question was involved; but the federal question was discussed in one part of the opinion of the state Supreme Court, and that court was of the opinion that the state statute complained of did not inpair the obligation of the contract (p. 24), and Justice Miller, in delivering the opinion of the court held (p. 25), that the federal question was sufficiently raised.

In Chicago B. & Q. R. Co. vs. City of Chicago, 166 U. S. 226, the claim of federal right was first made in the motion of the defendant for a new trial.

In Rothschild vs. Knight, 184 U. S. 334, the federal

question was first raised in the Supreme Court of the state.

In Mallett vs. The State, 181 U. S. 589, it was held that even where the federal question is first presented in a petition for a rehearing to the state Supreme Court, it is not raised too late if that court entertains the petition for rehearing and discusses and decides the federal question.

In Green Bay & M. Canal Co. vs. Paper Co., 172 U. S. 58, it was held that if it appeared from the record by clear and necessary intendment, that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, it will be sufficient.

In Blythe vs. Hinckley, 180 U. S. 333, it was held that a writ of error to a state court from the Supreme Court of the United States will not be dismissed for want of jurisdiction, where a federal question is fairly raised, merely because the claim by which it is presented is not well founded.

In Crapo vs. Kelly, 16 Wall. 610, the controversy was as to the half ownership of Gibbs & Jenny to the ship Arctic. While the vessel was on the high seas, Gibbs & Jenny applied to the judge of the insolvent court of Massachusetts for the benefit of the insolvent law of that state. The judge appointed Crapo and others assignees, and made a deed of assignment to them. Afterwards the Artic arrived at New York, and an attachment was levied upon her by Kelly, the sheriff, in a suit against Gibbs & Jenny. Crapo and his co-assignees then made a claim against

Gibbs & Jenny's interest in the ship. The court of last resort in New York decided against their claim and in favor of the sheriff under his attachment. Up to this time we do not understand from the report that any federal question was expressly raised, but the case was carried to this court by writ of error under the 25th section of the Judiciary Act, it then being claimed that the New York court had disregarded the constitutional provision as to the faith and credit to be given in each state as to public acts, records and judicial proceedings of every other state. The jurisdiction of this court was challenged by Mr. Evarts, who represented Kelly, the sheriff. He said (p. 614), "no adjudication on this controversy has ever yet been had in Massachusetts, and all that the insolvent proceedings in Massachusetts have contributed towards such an adjudication has been to furnish the assignees a standing, which has been fully recognized by the New York court;" but this court held that the New York court necessarily decided what effect the insolvent proceedings in Massachusetts had by law and usage in that state, and that as it decided against the effect which the defendant set up for them, the court had jurisdiction to review the judgment of the New York court: and this court reversed the judgment of the New York court, and decided in favor of the assignee.

On the question of jurisdiction the court reviewed Green vs. Van Buskirk, 5 Wall. 310, on motion to dismiss, and 7 Wall. 139, on the merits. In that case both plaintiff and defendant were residents of New York, and Bates was

a debtor to each; the latter executed and delivered to Van Buskirk in New York a chattel mortgage on certain iron safes in Chicago, but before the mortgage was recorded in Illinois or possession taken under it, Green had an order of attachment issued from an Illinois court and levied upon the safes which were sold under the order and the proceeds were applied in satisfaction of Green's claim. Van Buskirk then brought suit against Green in New York to recover the value of safes, and the question was whether Van Buskirk or Green had the stronger right to the safes. Green claimed among other things that the mortgage to Van Buskirk was fraudulent as against creditors (5 Wall. 316-317); but the court of last resort in New York decided in favor of Van Buskirk. The case was brought to this court under the 25th section of the Judiciary Act, on the ground that full faith and credit had not been given to the judicial proceedings in Illinois. Mr. Carlisle, representing Van Buskirk, moved to dismiss. He said (5 Wall. 309-310): "The record neither shows that the construction of any clause of the constitution was drawn in question by the plaintiff in error in the state court, nor that any right was claimed under such clause, nor that any decision was made against such right; in fact, the clause did not admit of any constitutional question. The defense set up in the state court was only that the safes at the time of the seizure and sale belonged to Bates, and that by such seizure and sale the plaintiff in error acquired Bates' title. The only issue thus formed was as to the right of property and possession

at the time of such seizure; and this was the only issue tried and determined."

In the dissenting opinion delivered by Justice Nelson, and concurred in by Justice Swayne, the former said (p. 316): "It is claimed that this court has jurisdiction on the ground that the court below denied full faith, credit and effect to the Illinois judgment in the attachment proceedings. It is only on this ground that this attachment can be maintained. We have seen that no such point was made on the trial or ruled by the court."

These statements of fact by counsel and the dissenting justices are not controverted, but the majority of the court, whose opinion was delivered by Justice Miller, said (5 Wall. 311), it seemed clear that the state court "did pass upon the effect of the judicial proceedings in Illinois upon the title of the property in contest," and again (5 Wall. 314): "We do not decide that the proceedings in the State of Illinois have there the effect which plaintiff claims for them; because that must remain to be decided after argument on the merits of the case. But we hold that the effect which the proceedings have there by the law and usage of that state was a question necessarily decided by the New York courts, and that it was decided against the claim set up by plaintiff in error under the constitutional provision and statute referred to, and that the case is therefore properly here for review. Motion to dismiss overruled."

The report of the case on the merits (7 Wall. 139, 141, 145), is also instructive on the question of jurisdiction.

In fact we can find no decision of this court which holds that a federal question like the one at bar cannot be raised for the first time in either the printed brief or the oral argument of counsel in the state Supreme Court, if that court considers the federal question and decides it, and its decision is against the claim of federal right, and this conclusion, it seems to us, is a proper one to draw from the language of section 709 R. S. U. S.

And see:

N. Y. Cent. & H. R. R. Co. vs. New York. 22 Sup. Ct. Rep. 916.

Mallett vs. The State, 181 U. S. 589.

II.

"NO FEDERAL QUESTION WAS DECIDED OR NECESSARY TO THE DECISION MADE."

III.

"THE DECISION WAS CLEARLY UPON GROUNDS OTHER THAN A FEDERAL QUESTION AND THIS COURT HAS NO JURISDICTION."

These caims are identical and will be considered together.

In all of the cases cited by counsel this court held that the record did not disclose a case reviewable by this court. In some cases the record did not show a proper claim of federal right, and in others the decision of the court was not necessarily based on a federal question. Such are the cases where the judgment of the state Supreme Court is

based on two grounds, a federal question, and a local question, and the decision of the local question was broad enough to sustain the judgment, independent of the federal question.

The case at bar is not, however, like any of the cases cited by counsel.

In the decision by the Kansas Supreme Court, that court, in its statement of the case (Transcript of Record, p. 44), set out fully the claim of the plaintiff in error, and in its decision it upheld the validity of Sec. 203 of the executors' and administrators' act of the State of Kensas (Sec. 147, Ch. 107, G. S. Ks. 1897), which permits an executor duly appointed in any other state to be sued in any court of the state, in like manner as a non-resident may sue and be sued, and therefore permits the property of a nonresident executor to be attached in like manner and under like restrictions as the property of a non-resident may be attached. (Transcript of Record, p. 49.)

If, as claimed by the plaintiff in error, the Atchison county District Court had no authority to sequester the property of a dead man by proceedings in attachment, or order said attached property sold to pay such judgment, merely because the executor in charge of the estate of the dead man happened to be a non-resident of the State of Kansas, then its judgment and order were absolutely void, and under the Kansas law could be set aside at any time by motion, as was sought to be done in this case.

Section 575 of the Kansas code provides as follows:

"A void judgment may be vacated at any time, on motion of a party, or any person affected thereby."

The motions of the plaintiff in error, to set aside the judgment, and to withdraw the order of sale having been overruled by the Atchison county District Court, the plaintiff had a right to prosecute his proceeding in error to reverse the same under Sections 542 and 543 of the Kansas code, which read as follows:

"Sec. 542. The Supreme Court may reverse, vacate or modify a judgment of the District Court for errors appearing on the record; and in the reversal of such judgment or order, may reverse, vacate or modify any of the following orders of the district court, or a judge thereof: First—A final order. Second—An order that grants or refuses a continuance; discharges or vacates an injunction; that grants or refuses a new trial; or that confirms or refuses to confirm the report of a referee; or that sustains or overrules a demurrer. Third—An order that involves the merits of an action, or some part thereof.

"Sec. 543. An order affecting a substantial right in an action, when such an order in effect determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed as provided in this article."

In Winkfield vs. Brinkman, 31 Ks. 26, it was held that where the judgment was void, the defendant could file his

motion in the District Court to set aside such judgment, upon the ground that it was void, and if such motion is denied by the District Court, proceedings in error may be commenced in the Supreme Court within one year after the demand of such motion, even when one year has already elapsed after the rendition of the judgment.

We therefore have a final judgment in a suit in the highest court of the State of Kansas, in which a decision in the suit could be had, where is drawn in question the validity of a statute of the State of Kansas (Section 203 of the executors' and administrators' act), or an authority exercised under any state (Cady vs. Bard, 21 Ks. 479; Donifelser vs. Heyl, 7 Ks. App. 96; 59 Ks. 779), on the ground of their being repugnant to the constitution of the United States (Sections 1 and 2, Art. 4, and the 14th Amendment), and the decision is in favor of their validity, and where a right, privilege or immunity is claimed under the constitution of the United States and the decision is against such right, privilege, or immunity, specially set up or claimed by the plaintiff in error, under such constitution, which may be re-examined and reversed or affirmed in this court upon a writ of error. (Rev. Stat. U. S., Sec. 709.)

In this case if the claim of the plaintiff in error is well founded, the judgment of the Atchison county District Court was not merely voidable, but was absolutely void for want of jurisdiction in that court. Such being the case, it could be set aside on motion as was attempted in this case.

It is not questioned by any one that the proceedings of

the plaintiff in error were proper proceedings under the Kansas practice, and the sole question was as to the validity of the judgment of December 13, 1897. If it was a valid judgment, it would have to stand as such, but if it was an invalid and void judgment, the Atchison District Court should have set aside.

And this is the position taken by the Kansas Supreme Court, for in its opinion it said:

"The one question necessary for us to consider in the present status of this case is, was the judgment of December 13, 1897, absolutely void? If it was null and void, it could properly be attacked by the motions, the overruling of which constitutes the grievance now complained of, and if not so void, it stands as a final determination of all the matters in controversy in the action in which it was rendered, and as to those matters it is res adjudicata." (Transcript of Record, p. 45.)

The Kansas Supreme Court held that the judgment of December 13, 1897, was a valid judgment, and that the rights of plaintiff in error had been finally determined by that judgment. But to hold that it was a valid judgment it was necessary for that court to decide, and it did decide, that Sec. 203 of the executors' and administrators' act was a valid statute, and that, as construed in that case, it did not deny to the plaintiff in error any of his claimed federal rights.

Such a decision is not binding on this court because the question of res judicata is a local question, for the reason

that the decision when based on that ground is not broad enough to sustain the judgment independent of the federal question.

In National Foundry & Pipe Works vs. Oconto City Water Supply Co., 183 U. S. 216, it was held that a federal question is presented by a contention that due effect to a decree of a federal court was denied by the action of the court below in sustaining a plea of res judicata predicated on a decree of such federal court, where a determination whether the court correctly applied the plea necessitates deciding whether by sustaining such plea rights were denied which were vested under another decree of the federal court.

In that case the court, speaking by Justice White, said:

"The proposition substantially is that the state court, in maintaining the plea of res judicata resulting from the decree in the creditors' suit, denied the rights which were vested in the pipe works by virtue of the decree in the mechanic's lien suit. The argument in substance is, therefore, that, as the rights under the mechanics' lien decree were not impaired or destroyed by the decree in the creditors' suit, the consequence of erroneously deciding that they were obliterated by the decree in the creditors' suit was to refuse to give due effect to the rights vested in the water company as a result of the decree in its favor in the mechanic's lien suit.

"As it is thus demonstrated that the determination whether the court below correctly applied the plea of res

judicata necessitates our deciding whether due effect was given to the decree in the mechanics' lien suit, a federal question is presented which it is our duty to determine."

In Capital City Dairy Co. vs. State ex rel, 183 U. S. 238, it was held that a writ of error to review a judgment of a state court ousting a corporation from its franchise for violation of the statutes of the state relating to the manufacture and sale of oleomargarine will not be dismissed on the ground that adequate support for the judgment irrespective of any substantial federal question, is afforded by the finding of the state court that the corporation had violated a statute in refusing to furnish samples as therein required, where the judgment of the court was based upon the consideration given by it to all the asserted violations of the statutes jointly, which statutes were contended to be repugnant to the constitution of the United States.

In that case the court, speaking by Justice White, said:

"Before disposing of the controversies presented by the assignment of errors, it is necessary to notice a motion of the defendant in error to dismiss. It is predicated upon the ground that as the court below found the defendant had violated the statute in refusing to furnish samples as required by the law of 1884, this affords adequate support for the judgment of ouster, irrespective of any substantial federal question. It is true, in the pleadings it was not asserted that the provision of the Ohio law requiring the delivery of samples was repugnant to the constitution of the United States, but in the certificate made by the Supreme

Court of Ohio on the day its opinion was announced, it is certified that for the purposes of the decision of the case it became necessary to determine whether the act of 1884, providing for the delivery of such samples, was repugnant to the constitution of the United States. Conceding that the certificate can only serve to aid in eludicating whether a federal question was presented by the record, and that such certificate cannot, independently in and of itself, impart into the record such a question when not otherwise properly inferable from the record, we do not think the motion to dismiss well taken. We cannot, from an inspection of the opinion of the Supreme Court of the State of Ohio, conclude that the judgment of ouster which the court rendered was predicated alone upon the fact that the defendant had failed to deliver samples as required by the statute. On the contrary, we think the context of the opinion of the court demonstrates that the judgment against the corporation was based upon, not alone the mere failure to deliver the samples, but because of that failure, as connected with and explained by the acts of the corporation, in continuously, and, as described by the court, flagrantly, violating, not one, but most of the other statutes relied on."

In M. K. & T. Ry. Co. vs. Elliott, 184 U. S. 695, it was held that the fact that a state court, in deciding a federal question, erroneously declares that no federal question exists, does not preclude a review of its decision on writ of error from the Supreme Court of the United States.

In Anderson vs. Carkins, 135 U. S. 483, the court said:

"It is immaterial that the state court considered the case to be within the provisions of certain state statutes. The grasp of the federal statute must first be released. The construction and scope of that are federal questions, in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court."

In Columbia Water Power Company vs. Light and Power Company, 172 U. S. 475, it was held that the fact that a case involving the question of the impairment of a contract by state legislation is disposed of by the state court upon a construction of the contract does not deprive the Supreme Court of jurisdiction to review such decision, it being the duty of that court in such cases to determine for itself the proper construction of the contract upon which the plaintiff relies.

In that case Justice Brown, speaking for the court, said (page 487):

"While, in so holding, the court disposed of the case upon the construction of the contract under which the plaintiff asserted its right, such question is no less a federal question than would be the case if the construction of the contract were undisputed, and the point decided upon the ground that the subsequent act confirming the contract with the defendant did not impair it. The question in either case is whether the contract has been impaired, and that question may be answered either by holding that there is no

contract at all, or that the plaintiff had no exclusive rights under its contract, or granting that it had such exclusive rights, that the subsequent legislation did not impair it. These are rather differences in the form of expression than in the character of the question involved, and this court has so frequently decided, notably in the very recent case of McCullough vs. Virginia, 172 U. S. 102, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question (citing cases)."

In First National Bank vs. Anderson, 172 U. S. 573, it was held that where a national bank defended against an action for the conversion of collaterals, which plaintiff alleged it had agreed to sell him, on the ground that it was prohibited by the national banking act from making such a contract, and that such prohibition exempted it from any liability whatever growing out of the transaction, a decision of the state court permitting a recovery by plaintiff necessarily determined the contention of exemption adversely to the defendant, and was reviewable by the Federal Supreme Court, although the judgment of the state court was based on general principles of law, independently of the question of ultra vires, citing,

Bank vs. Townsend, 139 U. S. 67.

We think it is clear from the above authorities that the motion of the defendant in error to dismiss or affirm should be overruled.

SPECIFICATION OF ERRORS.

I.

Richard A. Park, as plaintiff, commenced his action against William H. Risk, executor of the estate of George Manley, deceased, as defendant, in the District Court of Atchison County, Kansas, by attachment and on the ground that the defendant was a non-resident of the State of Kansas. Reuben M. Manley succeeded the said William H. Risk, as executor of said estate, and said action was revived against him. On December 13, 1897, judgment was rendered in said action in favor of the plaintiff therein, Richard A. Park, and against the defendant therein, Reuben M. Manley, executor of the estate of George Manley, deceased, for $2,463.07, with interest at the rate of six per cent per annum and costs of suit, and certain real property of said defendant therein, so attached, was ordered sold to satisfy said judgment and costs. On May 31, 1900, the defendant in said suit, Reuben M. Manley, executor of the estate of George Manley, deceased, filed his motion in the said District Court of Atchison County, Kansas, to set aside the said judgment, and also his motion to set aside the order and judgment of said court ordering the property attached in said action to be sold to satisfy said judgment, for that the said District Court of Atchison County, Kansas, had no jurisdiction to entertain said suit, or to render

judgment therein, or to order the property attached therein to be sold to satisfy said judgment; that said action was a suit against the executor of the estate of a dead man, and under the constitution and laws of the State of Kansas, the Probate Court of Atchison County, Kansas, and not the District Court of Atchison County, Kansas, had jurisdiction to entertain the claim of the plaintiff; that no attachment could legally issue against the property of the defendant executor, and the said District Court of Atchison County, Kansas, in rendering said judgment, and in ordering the sale of said attached property did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the Orphans' Court of Union County, New Jersey, where the estate of George Manley, deceased, was being administered, and did not accord to the defendant, a citizen of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas, as guaranteed by Art. 4, Secs. 1 and 2, of the constitution of the United States, but abridged the privileges of the defendant and deprived him of his property without due process of law, guaranteed him by the fourteenth amendment to the constitution of the United States. That on June 2, 1900, said motions were heard and were each overruled by the District Court of Atchison County, Kansas, and by due proceedings therefor said matter and cause were taken on error to the Supreme Court of the State of Kansas, and said court, by its decision and judgment, affirmed the decision and judgment of the said District

Court of Atchison County, Kansas. And the Supreme Court of the State of Kansas erred in affirming the decision and judgment of the District Court of Atchison County, Kansas, in refusing to set aside said judgment.

II.

The Supreme Court of the State of Kansas erred in affirming the decision and judgment of the District Court of Atchison County, Kansas, in refusing to set aside the said order and judgment ordering the property attached in said action to be sold to satisfy said judgment.

III.

The Supreme Court of the State of Kansas, erred in that it did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the Orphans' Court of Union County, New Jersey, where the estate of George Manley, deceased, was being administered, as required by section 1 of article 4, of the constitution of the United States, in that it decided that the property of the estate of George Manley, deceased, and of Reuben M. Manley, the executor of said estate, could be attached in an action for debt brought in the District Court of Atchison County, Kansas, against the executor of said estate by attachment, and that said property so attached could be sold to satisfy said judgment.

IV.

The Supreme Court of the State of Kansas, erred in that it did not accord the defendant, in said suit, the plaintiff in error herein, a citizen of the State of New Jersey, all

of the privileges and immunities of an executor resident in the State of Kansas, as guaranteed by section 2 of article 4 of the United States, in that it decided that the property of the estate of George Manley, deceased, and of Reuben M. Manley, the executor of said estate, could be attached in an action for debt brought in the district court of Atchison County, Kansas, against the executor of said estate, and that said property so attached could be sold to satisfy said judgment, when the property of an executor, resident in the State of Kansas, was not subject to attachment process and could not be ordered sold to satisfy a judgment for debt by execution or order of sale on proceedings by attachment, and discriminated against him in that regard solely because he was a non-resident of the State of Kansas.

V.

The Supreme Court of the State of Kansas, erred in that it enforced a law or laws of the State of Kansas, which abridged the privileges and immunities of the defendant in said suit, the plaintiff in error herein, and citizen of the United States, and deprived him of his property without due process of law, and denied him the equal protection of the laws, guaranteed him by the fourteenth amendment to the constitution of the United States, in that it decided that the property of the estate of George Manley, deceased, and of Reuben M. Manley, the executor of said estate, could be attached in an action for debt brought in the District Court of Atchison County, Kansas, against the

executor of said estate, and that the property so attached could be ordered sold to satisfy said judgment, when the property of an executor, resident of the State of Kansas, was not subject to attachment process and could not be ordered sold to satisfy a judgment for debt by execution or order of sale on proceedings by attachment, and discriminated against him in that regard solely because he was a non-resident of the State of Kansas.

VI.

The Supreme Court of the State of Kansas erred, in that it decided that the rights of the defendant in said suit, the plaintiff in error herein, were concluded by the judgment of the District Court of Atchison County, Kansas, rendered on December 13, 1897, because said judgment was void on its face for the reason that it was rendered against an executor of an estate, and because the property of a dead man was ordered sold to satisfy an ordinary judgment in attachment proceedings rendered against the executor of said estate, and said judgment was rendered and order of sale of attached property made solely because the executor of said dead man was a non-resident of the State of Kansas, and said judgment and order of sale of attached property would have been void if given and made against an executor resident of the State of Kansas, thereby depriving said non-resident executor of his privilege of administering said estate under the orders of the surrogate of the Orphans' Court of Union County, New Jersey, and of the Probate Court of Atchison County, Kansas, and of his

immunity from suits in the District Court of Atchison County, Kansas, by attachment, and depriving him of his property without due process of law and denying him the equal protection of the laws.

BRIEF OF THE ARGUMENT.

For convenience we think it would be better to present all of the specifications of error together.

FIRST:—UNDER THE CONSTITUTION AND LAWS OF THE STATE OF KANSAS, AN EXECUTOR, RESIDENT IN THE STATE OF KANSAS, COULD BE SUED IN A DISTRICT COURT OF THE STATE, BUT THE PROPERTY IN HIS CHARGE COULD NOT BE ATTACHED, NOR SOLD ON EXECUTION.

The constitutional and statutory provisions applicable are as follows:

"Section 6.—The District Courts shall have such jurisdiction in their respective districts as may be provided by law." (Sec. 6, Art. 3, Constitution.)

"Sec. 1.—There shall be in each county, organized for judicial purposes, a district court, which shall be a court of record, and shall have general original jurisdiction of all matters, both civil and criminal (not otherwise provided by law), and jurisdiction in cases of appeal and error from all inferior tribunals, and shall have a general supervision and control of all such inferior courts and tribunals, to prevent and correct errors and abuses." (Par. 1961, G. S. Ks. 1889.)

"Section 8.—There shall be a probate court in each county which shall be a court of record, and shall have such probate jurisdiction and care of estates of deceased persons, minors and persons of unsound minds, as may be prescribed by law." (Sec. 8, Art. 3, Constitution.)

"Section 80.—All demands against the estate of any deceased person shall be divided into the following classes: First—Funeral expenses. Second—Expenses of the last sickness, wages of servants, and demands for medicines and medical attendance during the last sickness of the deceased, and the expenses of administration. Third—Debts due the state. Fourth—Judgments rendered against the deceased in his lifetime; but if any such judgments shall be liens upon the real estate of the deceased, and the estate shall be insolvent, such judgments as are liens upon the real estate shall be paid without reference to classification, except the classes of demands mentioned in the first and second sub-divisions of this section shall have precedence of such judgments. Fifth—All demands, without regard to quality, which shall be legally exhibited against the estate within one year after the granting of the first letters on the estate. Sixth—All demands thus exhibited after the end of one year and within two years after letters granted. Seventh—All demands thus exhibited after the expiration of two years, and within three years after granting of such letters." (Sec. 80, Executors' and Administrators' Act; Par. 2864 G. S. Ks. 1889.)

"Section 83.—All actions commenced against such ex-

ecutor or administrator, after the death of the deceased, shall be considered demands legally exhibited against such estate, from the time of serving the original process on such executor or administrator." (Sec. 83 Ex. and Adm. Act; Par. 2867, G. S. Ks. 1889.)

"Section 84.—Any person may exhibit his demand against such estate by serving upon the executor or administrator a notice, in writing, stating the nature and amount of his claims, with a copy of the instrument of writing or account upon which the claim is founded, and such claim shall be considered legally exhibited from the time of serving such notice." (Sec. 84 Ex. and Adm. Act; Par. 2868 G. S. Kas. 1889.)

"Section 86.—Any person having a demand against an estate may establish the same by the judgment or decree of some court of record, in the ordinary course of proceeding, and exhibit a copy of such judgment or decree to the probate court; but the estate shall not be liable for costs in any such proceeding commenced within one year from the date of the letters of administration." (Sec. 86, Ex. and Adm. Act; Par. 2870 G. S. Ks. 1889.)

It is manifest from the constitutional and statutory provisions, quoted above, that the Probate Courts in Kansas are given exclusive jurisdiction in the matter of allowing claims against the estate of a deceased person. Suits, however, may be instituted in any court of record to establish any such claim (Sec. 86, supra), but such judgment cannot be enforced by execution, but must be exhibited in and

allowed and paid by order of the probate court (Secs. 80 and 86, supra). And, of course, the property of the estate cannot be attached, for in the case of a judgment for the plaintiff in an attachment proceeding, the attached property is sold "under the same restrictions and regulations as if the same had been levied on by execution." (Sec. 222, Civil Code; Par. 4317, G. S. Kas. 1889.)

It is the established law in Kansas that the property of a dead man cannot be sold under an execution issued on a judgment rendered against his executor.

Achenbach vs. Pomeroy Coal Co., 2 Ks. App. 357.

Mendenhall vs. Burnette, 58 Ks. 355.

SECOND: UNDER THE CONSTITUTION AND STATUTES OF THE STATE OF KANSAS, NO AUTHORITY EXISTS FOR ATTACHING THE PROPERTY IN CHARGE OF A NON-RESIDENT EXECUTOR.

The constitutional and statutory provisions applicable to this enquiry are sections 6 and 8, article 3, constitution of Kansas, par. 1961, G. S. Ks., 1889, and sections 80, 83, 84 and 86 of the executors' and administrators' act, quoted above, and the following additional statutes:

"Section 1.—That upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death; and when any person shall die intestate in any other state or county, leaving any estate to

be administered within this state, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered." (Sec. 1 Ex. and Adm. Act; par. 2785 G. S. Ks. 1889.)

"Section 7.—If any person who is appointed an executor shall refuse to accept the trust, or if, after being duly cited for that purpose, he shall neglect to appear and accept the same, or if he shall neglect, for twenty days after probate of the will, to give bond as before prescribed, the court shall grant letters testamentary to other executors, if there be any capable and willing to accept the trust; and if there be no such other executor, the court shall commit administration of the estate, with the will annexed, to the widow of the deceased, or to his next of kin, or to such other person as would have been entitled thereto, if the deceased had died intestate." (Sec. 7 Ex. and Adm. Act; par. 2791 G. S. Ks. 1889.)

"Section 11.—No executor named in a will shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, except to pay funeral charges; nor to interfere in any manner with such estate, farther than is necessary for its preservation." (Sec. 11 Ex. and Adm. Act; par. 2795 G. S. Ks. 1889.)

"Section 23.—When any executor or administrator shall, after being notified by a party in interest or cited by the court, neglect to render his accounts * * * *, or when the court shall be satisfied that such estate is not being administered for the advantage of the real parties in interest,

or that any executor or administrator has or is abusing his trust in any respect, it shall be the duty of the court, upon due hearing therefor had, to remove such executor or administrator." (Sec. 23 Ex. and Adm. Act; par 2807 G. S. Ks. 1889.)

"Section 28.—Letters testamentary and of administration shall in no case be granted to a non-resident of this state." (Sec. 28 Ex. and Adm. Act; par. 2812 G. S. Ks. 1889.)

"Section 144.—When an executor or administrator shall be appointed in any other state, territory or foreign country on the estate of any person dying out of this state, and no executor or administrator thereon shall be appointed in this state, the foreign executor or administrator may file an authenticated copy of his appointment in the probate court of any county in which there may be any real estate of the deceased; after which he may be authorized, under an order of the court, to sell real estate for the payment of the debts or legacies and the charges of administration, in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state." (Sec. 144 Ex. and Adm. Act; par. 2929 G. S. Ks. 1889.)

"Section 174.—When administration shall be granted in this state on the estate of any person who, at the time of his decease, was an inhabitant of any other state or country, such estate shall be administered and distributed according to the laws of this state; and the balance in the

hands of the administrator, on final settlement, to which the foreign executor or administrator of said deceased may be entitled, shall be paid over to such foreign executor or administrator, upon the order of the court." (Sec. 174 Ex. and Adm. Act; par. 2960 G. S. Ks. 1889.)

"Section 203.—An executor or administrator, duly appointed in any other state or country, may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued." (Sec. 203 Ex. and Adm. Act; par. 2989 G. S. Ks. 1889.)

"Section 24.—Authenticated copies of wills, executed and proved according to the laws of any state or territory of the United States, relative to any property in this state, may be admitted to record in the probate court of any county in this state where any part of such property may be situated; and such authenticated copies, so recorded, shall have the same validity as wills made in this state, in conformity with the laws thereof." (Sec. 24 Wills' Act; par. 7228 G. S. Ks. 1889.)

"Section 28.—After allowing, and admitting to record, a will, persuant to the four preceding sections of this act, the court may grant letters of administration with the will annexed, and may proceed to the settlement of the estate that may be found in this state; and the executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey real estate and personal estate, by virtue of the will or the law, as other ex-

ecutors or administrators with the will annexed, shall or may have by law." (Sec. 28 Wills' Act; par. 7232, G. S. Ks. 1889.)

"Section 29.—No will shall be effectual to pass real or personal estate, unless it shall have been duly admitted to probate, or rendered, as provided in this act." (Sec. 29 Wills' Act; par. 7233 G. S. Ks. 1889.)

It will be noticed from a reading of the above statutes that a discrimination is made against non-residents, by Sec. 28 of the Executors' and Administrators' Act, but that section refers to letters testamentary or of administration issued upon the estate of any inhabitant of the State of Kansas, or letters of administration issued upon the estate of a person who died intestate in any other state or country, as provided in section 1 of the executors' and administrators' act. The issuing of letters testamentary to a non-resident executor is plainly allowable under section 144 of the executors' and administrators' act, and sections 24 and 28 of the Wills act.

It will also be noticed that if a non-resident of Kansas dies intestate his property situate in the State of Kansas is exempt from suits by attachment in the district court and is placed under the exclusive control of the probate court.

And the property of a non-resident executor is fully protected from attachment suits and placed in the custody of the probate court by the above statutes.

Thus section 144 of the Executors' and Administrators' act permits the non-resident executor to file an authenti-

cated copy of his will in the probate court of the county, in which there may be any real estate of the deceased, after which he may be authorized, under an order of the probate court, to sell real estate for the payment of debts "in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state." And section 28 of the Wills act provides that after the foreign will is admitted to probate, the court may grant letters testamentary thereon, and the executor taking out letters "shall have the same power to sell and convey real and personal estate, by virtue of the will or the law, as other executors or administrators, with the will annexed, shall or may have by law."

Nor is the grasp of the probate court over the property in charge of a non-resident executor released by reason of the neglect or refusal of such executor to probate his will in Kansas, and proceed to act as such executor. By section 7 of the Executors' and Administrators' act such executor may be cited by the court to qualify, and upon his refusal, the probate court shall commit administration of such estate, with the will annexed, to some other person, and under section 23 of the same act there is a like power of removal. Section 144 of the same act provides for the appointment of an executor, where the non-resident executor has not filed an authenticated copy of his will in the probate court, as provided for in said section, and section 174 of the Executors' and Administrators' act, and sections 24 and 28 of the Wills' act, plainly recognize the power of

the probate court to administer on the estate confided to the charge of a non-resident executor.

If these statutes do not confer jurisdiction, and exclusive jurisdiction, on the probate courts of the state, it would be difficult to frame statutes that would.

In the case at bar we have the estate of a deceased person, and the control of such estate is "prescribed by law" in the probate court. Why is not this jurisdiction exclusive under section 8 of article 3 of the Kansas constitution, and paragraph 1961 G. S. Ks. 1889, quoted above?

If the defendant in error had a valid claim against the estate of George Manley, deceased, he had a plain and adequate remedy given him by the Kansas laws for the payment of the same by proceedings therefor had in the Atchison County Probate Court. He could have exhibited his demand against said estate under section 84 of the Executors' and Administrators' act, or he could have established his demand under section 86 of said act, by obtaining judgment thereon in the Atchison County District Court, and have exhibited a copy of such judgment in the Probate Court for allowance, but if he sued and obtained judgment in the District Court he would not be allowed for the costs made in the District Court. Such judgment when exhibited in the Probate Court, would be allowed and classified under section 80 of said act, and would be paid under the order of the Probate Court, the same as any other demand against the estate of the same class, but it could not be collected by an execution issued on said District Court

judgment. There is no question in this case of the right of the defendant in error to sue the plaintiff in error for debt, in any court of record in the state, for that right is given by section 86, supra, and applies as well to suits against resident executors as to suits against non-resident executors. The plaintiff in error admits he was liable to suit in any court of record of the state to establish a debt against the estate in his charge, but he denies the right of the defendant in error to obtain jurisdiction either over his person, or over the property in his charge, by proceedings in attachment, such as were had in this case.

The case of Achenbach vs. Pomeroy Coal Co. (2 Ks. App. 357), is exactly in point. In that case it was held that an individual creditor could not, by execution, absorb more than his pro rata share of the dead man's estate. If he cannot do so by attachment, for in case of a judgment for the plaintiff in the attachment proceedings the attached property is sold "under the same restrictions and regulations as if the same had been levied on by execution." (Sec. 222, Civil Code of 1889.)

An attachment of goods by a state officer pre-supposes a right to take possession and custody of those goods, and to make such possession and custody exclusive. If the officer attaches upon mesne process he has a right to hold the possession to answer to exigency of the process.

Harris vs. Drurie, 3 Pet. 304.

Taylor vs. Caryl, 20 How. 596.

In 19 Am. & Eng. Enc. L. (1st Ed.), p. 162, the text

says that in Great Britain, the United States, and other countries subject to institutions of English origin, the estate of a dead man is administered and distributed under the supervision of a local court, whose jurisdiction is confined in whole or in part to such matters.

Gumee vs. Maloney, 38 Cal. 85; s. c. 99, Am. Dec. 357.

By the express provision of our state constitution (Sec. 8, Art. 3), the probate court has "such jurisdiction and care of estates of deceased persons, minors and persons of unsound minds, as may be prescribed by law." And it is prescribed by law that a foreign executor may, by taking certain appropriate proceedings, be authorized "under the order of the court to sell real estate for the payment of debts or legacies and the charges of administration, in the same manner and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state." (Sec. 144, Exrs. and Admrs. Act.) If a foreign executor has neglected to qualify in Kansas, under Sec. 144 of the Exrs. and Adms. Act (paragraph 2020, Genl. Stats. Ks., 1889), such neglect does not give a creditor a right to attach the property of the dead man situate in Kansas, but the remedy of such creditor is in equity, for the property of a dead man is a trust fund, and equity will never allow a trust fund to be wasted or destroyed for want of a trustee to protect it, and a creditor, by proceedings in equity, may compel the foreign executor

to qualify, or upon his neglect or refusal to do so, appoint a trustee or receiver for the property.

20 Am. & Eng. Enc. L. (1st Ed.), p. 306.

20 Am. & Eng. Enc. L. (1st Ed.), p. 319.

20 Am. & Eng. Enc. L. (1st Ed.), p. 321.

Johnson's Appeal, 9 Pa. St. 416.

Sec. 174, Ex. and Ad. Act.

For the refusal or neglect of a foreign executor to prove the will, qualify and give bond, will be considered as a refusal of the trust.

7 Am. & Eng. Enc. L. (1st Ed.), p. 123, n. 2.

Sawyer's Appeal, 16 N. H. 459.

Or the foregoing executor may be cited to accept the same under Sec. 7, Executors' and Administrators' Act, and upon his refusal, another executor may be appointed by the Probate Court.

7 Am. & Eng. Enc. L. (1st Ed.), 302.

7 Am. & Eng. Enc. L. (1st Ed.), 399, 400

Stebbins vs. Lathrop, 4 Pick. 33.

The constitutional requirement that the probate court shall have the care of the estates of deceased persons cannot be abrogated by giving such a construction to Sec. 203 of the Executors' and Administrators' Act (Paragraph 2989, Gen. Stats. Ks. 1889), as would, in effect, place the care of such estates in the law side of the district court.

The district court has such jurisdiction, and such jurisdiction only, as may be provided by law. (Sec. 6, Art. 3, Const. Ks.)

By law the district court is given general original jurisdiction of all civil or criminal proceedings not otherwise provided by law, and appellate and supervisory jurisdiction over the probate court and other inferior courts. (Par. 1961, G. S. Ks. 1889.) It has no probate jurisdiction, for that is otherwise provided by the law in the probate court, and it can get no jurisdiction by this proceeding to administer the estate of George Manley, deceased, situate in Kansas, for no Kansas decision can be found giving to the district court any other than an equitable jurisdiction over the assets of the estates of deceased persons.

"It is true that the district court has jurisdiction of some matters relating to the estates of deceased persons, but it is an equitable jurisdiction, not to be exercised where the plaintiff has a plain and adequate remedy by ordinary proceedings in a tribunal especially provided by the statute."

Keith vs. Guthrie, 59 Ks. 200, 201.

Proctor vs. Piclow, 57 Ks. 119.

Stratton vs. McCandless, 27 Ks. 305.

The questions, constitutional and otherwise, now presented, were not urged nor discussed in Cady vs. Bard, 21 Ks. 667, and that decision does not go to the extent claimed by the defendant in error, for Judge Brewer held that "jurisdiction to any extent required the overruling of the motion to set aside the service." (Last part of opinion.)

In Cady vs. Bard, the action was brought by Cady against R. W. Bard and another, as executors of the estate

of G. W. Bard, deceased, to foreclose a mortgage given by G. W. Bard in his life time. On the affidavit of the plaintiff that the defendant executors were non-residents, an attachment was issued and levied on the mortgaged land.

Under the law Cady had a right in foreclosing his mortgage to get service on the non-resident defendants by publication, which he did. His attaching the mortgaged land was, therefore, an idle proceeding. No other than the mortgaged property was attached, so that no question arose in that case regarding an attachment of property in the custody of the probate court, for Cady had a right to foreclose his mortgage in the district court, regardless of the probate court.

Shoemaker vs. Brown, 10 Ks. 283.

Johnson vs. Cain, 15 Ks. 532.

The foreign executors appeared specially and moved the court to set aside, not the attachment, but the service on them of process in the foreclosure action by publication, which motion the district court sustained. Such decision of the district court was properly reversed by the supreme court because service could be had against them by publication in an action to foreclose a mortgage (Sec. 72, Civil Code of 1889), and "jurisdiction to any extent required the overruling of the motion to set aside the service."

The question involved in Cady vs. Bard, supra was again before this court in Heyl vs. Donifelser, 59 Ks. 779, but was left undecided by that court, and the decision of the Supreme Court of Kansas in this case is the first decision

of that court which holds that the property in charge of a non-resident executor can be attached for an ordinary debt.

The claim that the only way to get jurisdiction of the defendant is to attach the property in Kansas, is not tenable. As we have indicated above, a suit in equity could have been maintained to compel him to qualify, or upon his default, to have a receiver appointed; and in such an action, service could be had by publication.

See 72 Civil Code.

Murray vs. Murray, 115 Cal. 266.

In the case of Achenbach vs. Pomeroy Coal Co., (2 Ks. App. 357), the Kansas Court of Appeals, northern department, held that the summary proceedings by execution to enforce the individual liability of a stockholder, in an insolvent corporation, cannot be employed to enforce such liability against the estate of a deceased stockholder, which is in course of settlement in the probate court, and in its opinion the court said:

"The only purpose and object of the proceeding is to authorize the issuing of an execution against property. Beyond that the finding and order of the court do not go. In principle, we see no difference between such a proceeding against the estate of a deceased stockholder and an application for an execution on an ordinary judgment against the administrator in his official capacity. It needs no argument to show that the common remedies, by execution and attachment, which are generally available to a creditor for the purpose of enforcing his judgment, cannot be used, after

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the death of the judgment creditor, to reach the assets of his estate. As said in Strouse vs. Lawrence, 160 Pa. St. 421; 28 Atl. 930. 'If this can be done as to one asset of a decedent's estate, it can be done as to all, and any creditor with a claim sufficient to absorb the whole personal estate of a decedent, can, by process of attachment execution on a judgment obtained after the death of the decedent, appropriate the entire estate to the payment of the debt, to the exclusion of all other creditors.' We know of no reason why one seeking to enforce the liability of a deceased stockholder in an insolvent corporation should be put upon a more favorable footing than an ordinary judgment creditor of the deceased. The law contemplates that all general creditors, having demands of the same class against the estate of a deceased person, shall be upon an equality, and shall be paid pro rata out of the estate, in the due course of its administration in the probate court. To permit an execution to be issued against the assets of an estate in the hands of an administrator, in favor of any creditor or claimant, would do violence to the whole spirit of the law concerning the settlement of estates of deceased persons, and would result in an unwarranted interruption of any orderly administration. If it be suggested that the order of the court need not be carried out by the actual issuance and service of the execution, the query arises, for what purpose was the order made? If it is not to be enforced, why this useless expense to the estate? We are clearly of the opinion that this summary remedy is not available in such cases."

The case of Mendenhall vs. Burnette, 58 Ks. 355, is directly in point.

In that case the question involved was whether a creditor who had obtained a judgment against a debtor who died after judgment was rendered against him, could, after reviving his judgment, collect the same on execution, and it was held that such creditor could collect such judgment only out of the real property that was bound by the lien of such judgment, but that he could not collect the same out of the personal property of the estate, nor out of the land to which the lien of the judgment did not attach.

The court, in its opinion, after quoting paragraphs 2116, 2898, 2864, 2870 and 2919 Genl. Stats. Ks. 1889, and Secs. 439, 512 and 419 of the Code, says:

"It is contended by those provisions the legislature has confided the entire management of the estate of a deceased person not incumbered with special liens at the time of his death to the probate court; that divided control is not desirable, and was not contemplated by the legislature, but that it is the policy to vest in one tribunal full jurisdiction, to the end that the property may be best preserved and distributed to those entitled to it. That the district court has jurisdiction to enforce specific liens on the real property of a deceased person is well settled, and not controverted by counsel in this case. (Brenner vs. Bigelow, 8 Ks. 496. Shoemaker vs. Brown, 10 Ks. 883; McLean vs. Webster, 45 Ks. 644.) Indeed, the powers of the probate court would be quite inadequate to the adjustment of all the var-

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ious liens, claims to, and interests in real estate which are frequently necessary to be determined in actions for the foreclosure of a mortgage or other specific lien. * * * So far as the cases relied on by the plaintiff give countenance to the proposition that a general execution may issue against property on which the judgment creditor has no lien, we think the language used was obiter dictum, and that it never was the purpose of the legislature to authorize an execution against personal property not seized or subject to any specific lien at the time of the death of the debtor, or against lands on which the judgment was not a lien prior to the debtor's death. The execution authorized is special to enforce the lien, and not general against all the property."

In Williams, Admr. vs. Benedict, 8 How. 107, Thomas Williams was granted letters of administration on the estate of Benjamin J. Baldwin, deceased, in October, 1838. At the time said letters were issued Williams confidently believed that his intestate's estate would be amply sufficient to satisfy all his creditors. In November, 1839, John W. Benedict et al., obtained a judgment against the said administrator in the District Court of the United States for the State of Mississippi, for a debt due them by the intestate. The administrator having then discovered that the estate would not be sufficient to pay the debts of the deceased, suggested its insolvency to the probate court on the first Monday of December following, and the estate was adjudged insolvent and commissioners were appointed to re-

ceive and audit the claims against the estate. An execution having been issued on the Benedict judgment, and a levy made thereunder on the property of the estate, the administrator brought an action to enjoin the execution of the writ. A statute of Mississippi provided that when a decedent's estate was insolvent, the estate should be distributed proportionately among the creditors. Provision was made for the sale of the property, and commissioners were appointed to receive and examine all claims against the estate. It was also provided that no execution should issue on any judgment obtained against such insolvent estate, but the judgment should be filed as a lien against the estate.

The court held that the lien of a judgment obtained before the death of a decedent could not be effected by a declaration of insolvency subsequently made by an administrator of said decedent, but the court, on page 111, said:

"But, if at the time of the death, the fund from which each of the creditors has an equal right to claim satisfaction is insufficient to pay all, equity requires that one should not be permitted, by a mere race of diligence, to seize satisfaction of his whole debt at the expense of another. Hence, a declaration of insolvency must relate back to the death, in order that this equitable principle may have its effect."

It was also held that an administrator could report an estate as insolvent after nine months, although he could not be sued after nine months. And the court further said:

"As, therefore, the judgment obtained by the plaintiffs

in the court below did not entitle them to a prior lien, or a right of satisfaction in preference to the other creditors of the insolvent estate, they have no right to take in execution the property of the deceased which the probate court has ordered to be sold for the purpose of an equal distribution among all the creditors. The jurisdiction of that court has attached to the assets; they are in gremio legis, and if the marshal were permitted to seize them under an execution, it would not only cause manifest injustice to be done to the rights of others, but be the occasion of an unpleasant conflict between courts of separate and independent jurisdiction."

To the same effect is Byers vs. McAuley, 149 U. S. 608.

In that case the court held that an estate which is in course of administration in a probate court is in gremio legis, and a federal court has no jurisdiction on the filing of a bill by a citizen of another state against the administrator to recover a share in the property, to take the administration of the estate out of the state court, and itself make a decree of distribution determining the rights of citizens of the same state as between themselves. Its jurisdiction in such cases is limited to determining and awarding the shares of citizens of other states.

In the opinion the question is elaborately discussed by Justice Brewer, who delivered the opinion in Cady vs. Bard, 21 Ks. 667, and the reasoning is that the probate court had jurisdiction of the estate and control of the administrator,

and was subject to the orders of the probate court, and no other court, and that an interference by any other court with the administration of such estate would be a plain violation of the law creating such probate court, and defining its jurisdiction.

See also,

Ex parte Chetwood, 165 U. S. 443.

"Thus it will be seen, that under the decisions of this court a foreign creditor may establish his debt in the courts of the United States against representatives of a decedent, notwithstanding the local laws relative to the administration and settlement of insolvent estates, and that the court will interpose to arrest the distribution of any surplus among the heirs."

Green's Admr. vs. Creighton, 23 How. 107-108.

But in order to get satisfaction of said judgment it must be filed in and paid by order of the probate court.

Yonley vs. Lavender, 21 Wall. 276.

Heidritter vs. Oil Cloth Co., 112 U. S. 294.

We claim that under the authorities, which are numerous and uniform, the property of a dead man cannot be attached, and it can make no difference whether the dead man, or his executor or administrator, resided, or resides, outside of the state.

McComb vs. Dunch, Exr., 2 Dall. (Pa.) 73.

Pringle vs. Bracks, Exr., 2 Dall. (Pa.) 97.

Stanton vs. Holmes, 4 Day (Conn.) 96.

Bryant vs. Fussell, 11 R. I., 1, 286.

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Patterson vs. McLaughlin, Cr. C. C., 352, 356.

Redhead vs. Welton, 39 Beav. 521.

Matthey, Admr. vs. Williams, 24 L. J. C., p. 210.

"Foreign attachament does not lie in this state against an executor for a debt due from his testator, for the reason that it would interfere with our statute regulating the distributing of the estates of decedents. It would enable the attaching creditor to disturb the order of the payment of debts, prescribed by law (2 D. 13; 2 D. 97; 15 S. & R 173; 4 Bin. 381.) Aside from authority the case is too clear upon principle to need illustration."

Williamson vs. Beek, 8 Phil. 269.

"Property found in our state belonging to the succession of one who has died abroad and left no heirs here, is a vacant estate, and must be administered upon by a curator, and when a creditor wishes to be paid out of it he should obtain letters of curatorship.

"Decisions of one of our sister states, under laws nearly similar to our own, are in conformity with the ideas we have uniformily expressed on this subject. (See 2 Dallis 73 and 79.)

"The court of probates, it appears to us, had exclusive jurisdiction of this case, and an attorney appointed in the court below could not by an informality in pleading give jurisdiction when the whole proceedings were coram non judice."

Debuys vs. Yerby, Ex., 6 Martin 554; 1 Mart. N. S. 380.

"I am satisfied that the warrant of attachment was unauthorized, and hence was properly vacated. Even if the plaintiff had a cause of action in this state against the defendants as executors of Matthew Clark, deceased, the attachment was unauthorized. Proceedings against them to obtain an application of the property of the estate to the payment of the debts of the testator must be taken and conducted in the same way as if letters testamentary were granted to executors in this state.

"Letters ancillary or auxiliary may be granted here in the case of foreign executors when administration here becomes necessary. But in no case is a warrant of attachment authorized against executors. The property of the estate is trust property in their hands and must be dealt with as such for the benefit of all having an interest in it. Proceedings by attachment are proceedings at law for the benefit of the individual claimant. An injunction may perhaps issue in some cases against foreign executors or administrators with a view to the preservation of trust property, but the action then must be in equity, involving some unjust and unlawful proceeding in regard to it on the part of the executors or administrators.

"Proceedings in attachment are clearly inapplicable for the purpose of compelling the settlement of the estate of a deceased person or of enforcing payment by the executor of an individual demand contracted by the deceased, without charging the executors with any breach of duty, except a neglect to pay the debt."

Metcalf vs. Clark, 41 Barb. 47-48.

As we have already shown, the Kansas statutes recognize the rights of foreign executors in that state, and after the foreign executor has filed an authenticated copy of the will, and of the order of the foreign court appointing him executor, in the probate court in any county in Kansas in which there may be any real estate of the deceased, and the same has been recorded in the office of said probate court, as was done in this case, such probate court has jurisdiction over such estate, and such foreign executor, to the exclusion of the district court. (Secs. 144 and 174, Executors' and Administrators' Act; Secs. 24, 28, Wills' Act.)

To avoid the force of the statutes that we refer to the defendant in error (Brief p. 40), asserts that the plaintiff in error "while failing to have administration upon the Kansas property, complains that the laws of such state do not protect him while remaining out of that state and refusing to submit himself to the jurisdiction of its courts."

This is making a record by assertion. There is nothing in the record to justify the statement that the plaintiff in error failed to have administration upon the Kansas property or refused to submit himself to its courts, but the record shows to the contrary. The petition of the defendant in error alleges the death of George Manley, testate, and the naming of Reuben M. Manley and William H. Risk, as his executors, the probate of the will before the surrogate of the Orphans' Court of Union County, New Jersey, the granting of letters testamentary to William H. Risk, one of

said executors, the qualification of said Risk as such executor and that "thereon and thereby said William H. Risk, as such executor of said estate, became seized and possessed of all the property of the late George Manley, now deceased, lying and being situate in the State of Kansas." (Transcript of Record, p. 6.) And the return of the sheriff on the order of attachment issued herein shows that the property in controversy was levied upon and attached "as the property of said defendant, William H. Risk, executor of the estate of George Manley, deceased." (Transcript of Record, p. 17.)

Section 11 of the Executors' and Administrators' Act, supra, provides that no executor named in a will shall, before letters testamentary are granted, have any power to dispose of any part of the estate of the testator, and section 29 of the Wills' Act provides that no will shall be effectual to pass real or personal estate, unless it shall have been duly admitted to probate.

Even conceding the truth of the assertion of the defendant in error, is he not estopped by reason of his having attached the property in controversy herein, as the property of the plaintiff in error? Can he claim that it is the property of the plaintiff in error when he wants to attach it, and afterwards claim that it is a vacant estate when the plaintiff in error questions his right to attach it? We think not. As far as record shows, the property in controversy must be considered as the property of the plaintiff in error, and it must be presumed that the will of George Manley

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was either admitted to probate or recorded as required by section 29 of the Wills' act. The estate was there, and it was in the custody of the Atchison County Probate Court and, therefore, not subject to an attachment writ from any other courts. And, as we have said, ample authority existed for the appointment of an executor by the Atchison Probate Court to take charge of it.

The failure of an executor to qualify, only affects his right to act and to sue, and his want of power or title could only be taken advantage of by answer or by way of abatement, and such a disability could be cured pendente lite.

Smith vs. Peckham, 39 Wis. 414.

And the failure to qualify in Kansas would cause a like disability to be sued.

Galoway vs. Joyce, 1 Black 372.

"But while it is true that he (an executor) cannot maintain an action before probate, he may begin suit and proceed in it to that point where the production of probate becomes necessary; and it will be sufficient if he obtains the probate in time for that exigency. * * * Hence in most states it may be said that a subsequent grant of letters testamentary or of administration relates back and renders valid all acts which come within the scope of a rightful executor's or administrator's authority."

7 Am. & Eng. Enc. L. (1st Ed.), pp. 192-193. (Text.)

As a general rule an executor may do, before probate,

all acts pertaining to his office which do not require him to establish his title affirmatively.

7 Am. & Eng. Enc. L. (1st Ed.), p. 231, (1st col. notes).

In this case, by relation, the executor is considered to have qualified in Kansas as soon as he could have qualified there, which was immediately upon his qualifying in New Jersey, for the law knows no interval of time between the testator's death and the vesting of right and title in the executor.

Whitehead vs. Taylor, 10 Ad. & El. 212.

Brooks vs. McComb, 38 Fed. 317, (Decided March 25, 1889, by Judge C. G. Foster).

"The title of an executor to the estate of the decedent is derived solely from the will, and vests in him from the moment of the testator's death; that of an administrator is derived wholly from the grant of letters of administration, and becomes vested only from the time of the grant."

7 Am. & Eng. Enc. L. (1st Ed.), 230, par. 7.

In Keith vs. Guthrie, 59 Ks. 200, 201, it was expressly held that in matters pertaining to the distribution of a decedent's estate the probate court has exclusive jurisdiction subject to an appeal to the district court.

This is entirely inconsistent with the claim that an attachment may issue from the district court, and that a dead man's property may be seized thereon so that a single creditor may appropriate the whole estate to his own use.

In Wickham vs. Hall, 60 Fed. (Iowa), 326, 330, it is

held, (Shiras, J.), that a judgment against the personal representative of an estate "creates no lien upon the property of the estate, nor does it authorize the levy of an execution for its enforcement. The judgment simply determines the extent of a claim against the estate, and adjudges the amount thereof, but the debt thus established must take its place and share of the estate as administered by the probate court, and it cannot be enforced by process directly against the property of the decedent." (Citing Byers vs. McAuley, 149 U. S. 620, supra.)

THIRD: SEC. 203 OF THE EXECUTORS' AND ADMINISTRATORS' ACT (Par. 2989, G. S. Ks. 1889), AS CONSTRUED AND UPHELD IN THIS CASE, IS IN VIOLATION OF SEC. 2, ART. 4, CONSTITUTION OF THE UNITED STATES, IN THAT IT DOES NOT ACCORD TO THE PLAINTIFF IN ERROR AND HIS PREDECESSOR, CITIZENS OF THE STATE OF NEW JERSEY, ALL THE PRIVILEGES AND IMMUNITIES OF AN EXECUTOR RESIDENT IN THE STATE OF KANSAS. (Sec. 2, Art. 4, Const. U. S.)

FOURTH: SEC. 203 OF THE EXECUTORS' AND ADMINISTRATORS' ACT (Par. 2989, G. S. Ks. 1889), AS CONSTRUED AND UPHELD IN THIS CASE, IS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT ABRIDGES THE PRIVILEGES OF THE PLAINTIFF IN ERROR AND HIS PREDECESSOR, CITIZENS OF THE

UNITED STATES, AND THEIR IMMUNITY FROM SUIT BY ATTACHMENT, AND DEPRIVES THEM OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES THEM THE EQUAL PROTECTION OF THE LAWS.

FIFTH: TH RIGHT OF THE PLAINTIFF IN ERROR, AND HIS PREDECESSOR, CITIZENS OF THE STATE OF NEW JERSEY, TO ACT AS EXECUTORS OF THE ESTATE OF GEORGE MANLEY, DECEASED, IS A PRIVILEGE, AND THE EXEMPTION OF AN EXECUTOR, NOT A RESIDENT IN THE STATE OF KANSAS, FROM SUITS BY ATTACHMENT, IS AN IMMUNITY, WHICH IS GUARANTEED BY SEC. 2, ART. 4, CONSTITUTION UNITED STATES, AND THE SAME WERE DENIED BY THE DECISION OF THE SUPREME COURT OF KANSAS IN THIS CASE.

These points may be ~~remembered~~ considered together.

One of the privileges of a non-resident citizen is the right to institute an action in the courts, where a citizen of the state in which the suit is to be brought could maintain such an action, and one of the immunities of the non-resident citizen is the exemption from a suit where a citizen of the state would be exempted from such a suit. Such being the case the foreign executor in this case cannot be sued at law, by attachment in the Kansas courts, and the estate that is confided to his charge cannot be removed from the jurisdiction of the Probate Court of Atchison

County, Kansas, and administered by the Atchison county District Court, for the reason that the foreign executor would not be liable to such a suit if he were a resident of the State of Kansas.

We have not been furnished by this court with any definite or exact definition or declaration of what constitutes the privileges and immunities of the citizens of the several states that are guaranteed by the federal constitution. This court has uniformly refused to define those rights or to determine them except as necessary in the particular case before it. We think, however, that it has been sufficiently determined by the adjudged cases that the right to sue and be sued in the courts of the states is one of the privileges protected by the federal constitution, and that a non-resident can sue in any case where a resident of the state can sue. We also think that the right to be named as an executor in the last will and testament of a dead man is a property right and privilege of general citizenship, and is protected by the federal constitution, and that a non-resident executor has the same right of action and the same immunity from suit that he would have if he were a resident and citizen of the state where the suit was brought.

In Corfield vs. Coryell, 4 Wash. (C. C.), 371, 380, these "privileges and immunities" are stated to be the right to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions than are paid by other citizens of the state.

This is repeated in Campbell vs. Morris, 3 Har. &

McH. (Md.) 554, with the additional remark that such property shall be protected and secured by the laws of the state in the same manner as the property of citizens of the state is protected.

In Blake vs. McClung, 172 U. S. 239, it was held that while a state might, through judicial proceedings, take possession of the assets of an insolvent foreign corporation within its limits and distribute them among creditors, still it could not, under the constitution of the United States, deny the right of citizens of other states to participate in such distribution on equal terms with its own citizens.

The opinion of the court was delivered by Justice Harlan, and the decision of the Supreme Court of Tennessee (42 S. W. Rep. 53), was reversed, Justice Brewer and Chief Justice Fuller, dissenting.

Justice Harlan, in delivering the opinion of the court, reviewed the former decisions of the court: Conner vs. Elliott, 18 How. 591, where Justice Curtis said that the court had never undertaken to give any exact or comprehensive definition of the words, "privileges and immunities;" Corfield vs. Coryell, 4 Wash. C. C. 371, 380; McGrady vs. Virginia, 94 U. S. 395 (affirming 27 Gratt. 985), where it was held that a state could prohibit the citizens of other states from planting oysters in a river in that state where the tide ebbed and flowed. It was held that this right of fishing was a "common property" of the state, and that "the right which the people of that state thus acquired comes not from their citizenship alone, but from their citizenship and pro-

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perty combined. It is in fact a property right, and not a mere privilege or immunity of citizenship;" Paul vs. Virginia, 8 Wall. 168, 180, where the court observed: "It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property, and in the pursuit of happiness; and it secures to them in other states the equal protection of the laws;" Ward vs. Maryland, 12 Wall. 418, 430, where it was held, "that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the state might sell, or offer for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents;" Slaughter House Cases, 16 Wall. 36, 77, where the court said: "Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the right of citizens of other states within your jurisdiction," and Cole

vs. Cunningham, 133 U. S. 107, 113, 114. (In this latter case it was held that a decree of the state court restraining citizens of that state from prosecuting attachment suits begun in another state, and brought therein in order to evade the laws of the first state, did not violate the constitutional provision referred to above, but in Reynolds vs. Adden, 136 U. S. 348, the contrary was held to be the law where the party restrained was not a resident of the state.)

In the dissenting opinion Justice Brewer said:

"Indeed, aside from the demand made by the statutes of certain states of deposits by foreign corporations to secure home creditors, there are frequent illustrations of discrimination based upon the matter of residence. Often non-resident plaintiffs are required to give security for costs when none is demanded of resident suitors.

"Attachments will lie in the beginning of an action, authorizing the seizure of property upon the ground that the defendant is a non-resident when no such seizure is permitted in case of resident defendants. These and many similar illustrations, which might be suggested, only disclose that it has been accepted as a general truth that a state may discriminate on the ground of residence, and that such discrimination is not to be condemned as one between citizens; and yet, if the doctrine of the opinion of the court in this case be correct, I cannot see how those statutes can be sustained, for surely they discriminate between non-resident suitors in the matter of fundamental rights, to-wit: the

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right of equal entrance into courts, and equal security in the possession of property."

Blake vs. McClung, supra, was followed in Maynard vs. Association, 92 Fed. 435, where a similar Michigan statute was under consideration, and in Sully vs. American National Bank, 178 U. S. 289.

The equal protection of the laws, under the fourteenth amendment, implies not only equal accessibility to the courts for the prevention or the redress of wrongs and the enforcements of rights, but equal exemption with others of the same class from all charges and burdens of every kind.

In re Ah Fong, 3 Shaw. 144.

Ho Ah Kow vs. Numau, 5 Sawy. 552.

In re Tiburcio Parrott, 1 Fed. 481.

In Welton vs. Missouri, 91 U| S. 275, it was held that a statute of Missouri which required the payment of a license tax from persons who dealt in the sale of goods, wares and merchandise which were not the growth, produce or manufacture of the state, and required no such license tax from persons selling in a similar way goods which were the growth, produce or manufacture of the state, was in conflict with the power vested in congress to regulate commerce with foreign nations and among the several states.

In People vs. City of Detroit, 70 Mich. 534, it was held that Pub. Acts 1887, No. 313, Sec. 8, refusing to liquor sellers the right to become surety on the bond required by the act, was in violation of both the state constitutional provision which secured to every person his liberty and property

and Canst. U. S. Amend. 14, prohibiting any law which abridged the privileges or immunities of citizens.

In Saunders vs. Venning, 38 S. C. 502, it was held that 19 Stats. at Large, p. 937, exempting Berkley county from the operation of the general stock law, with a proviso that the act should not affect those citizens of the county who had conformed to the general stock law, is unconstitutional, the proviso being a special law applying to certain persons of a class, and repugnant to Const. Sec. 12, Art. 1, which declares that no person shall be subjected in law to any restraint in regard to his personal rights not laid on others under like circumstances.

In Central Loan & Trust Company vs. Campbell Com. Co., 173 U. S. 84, reversing 49 Pac. Rep. (Okl.) 48, it was held that a statute which requires the plaintiff to give a bond as a prerepuisite to the issuance of an attachment against a resident, but requires no bond where the attachment is against property of a non-resident, does not operate as a denial of due process of law or of the equal protection of the laws (Sec. 2, Art. 4, not cited.)

The decision was put on the ground that the state, for the purpose of attachment, has a right to classify residents in one class and non-residents in another, which point was conceded by counsel.

In Conner vs. Elliott, 18 How. 591, supra, it was held that the privileges and immunities secured to the citizens of each state, by the first clause of the second section of the

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fourth article of the constitution were only those which belong to citizenship.

That the community of gains between married persons given by the law of Louisiana, when the marriage is contracted within the state, or contracted out of the state and the parties afterwards go to Louisiana, did not extend by virtue of the constitution, providing that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states, so as to apply to a native citizen of Louisiana who was married while under age in the State of Mississippi, and resided there, together with her husband, during the continuation of the marriage.

In that case the court said (p. 593):

"It is sufficient for this case to say that according to the express words and clear meaning of this clause (Const. U. S., Art. 4, Sec. 2), no privileges are secured by it, except those which belong to citizenship. Rights attached by the law to contracts by reason of the place where such contracts are made or executed, wholly irrespective of citizenship of the parties to those contracts, cannot be deemed 'privileges of a citizen,' within the meaning of the constitution.

"Of that character are the rights now in question. They are incidents ingrafted by the law of the state on the contract of marriage. And in obedience to that principle of universal jurisprudence which requires a contract to be governed by the law of the place where it is made and is to be

performed, the law of Louisiana undertakes to control these incidents of a contract of marriage made within the state by persons domiciled there, but leaves such contracts made elsewhere, to be governed by the laws of the places where they may be entered into. In this there is no departure from any sound principle and there can be no just cause of complaint."

And again on page 594:

"Whether persons contracting marriage in Louisiana are citizens of that state or some other state, or aliens, the law equally applies to their contract; and so whether persons married and domiciled elsewhere be or be not citizens or aliens, the law fails to regulate their rights. The law does not discriminate between citizens of the state and other persons; it discriminates between contracts only. Such discrimination has no connection with the clause in the constitution now in question."

In Scott vs. Sanford, 19 How. 393, it was held that the provision entitling citizens of each state to all the privileges and immunities of citizens of the several states did not apply to a person who, in the state from which he comes, was endowed with certain rights of citizenship which are not given him in the other state, since, when the domicile is permanently changed, it is the province of the state to determine the status of its citizens and inhabitants.

In Paul vs. Virginia, 8 Wall. 168, supra, it was held that the privileges and immunities secured to citizens of each state in the several states by this clause, were those

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privileges and immunities which are common to the citizens in the latter states, under the constitution and laws of each, by virtue of their being citizens. Special privileges enjoyed by citizens in their own state, were not secured by it in other states.

That the clause relieved them from the disabilities of alienage of other states. It inhibited discriminating legislation against them; it gave them the right of free ingress and egress; it insured freedom in the acquisition and enjoyment of property.

In that case the court said (p. 180):

"But the privileges and immunities secured to the citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give the laws of one state any operation in other states."

And in Slaughter House Cases, 16 Wall. 79, supra, it is said that the privileges of a citizen of the United States are, inter alia, the right of a citizen of this great country to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions, the right of free access to its seaports, through which all operations

of foreign commerce are conducted, to the subtreasuries, land offices, and courts of justice, in the several states.

In Ward vs. Maryland, 12 Wall. 418, supra, a statute of Maryland required all traders resident within the state to take out a license and pay therefor certain sums regulated by a sliding scale from $102.00 to $150.00, according as their stock in trade might vary from $1,000 to more than $4,000. The statute also made it a penal offense for any person, not being a permanent resident of the state, to sell, or expose for sale, within certain limits, within the state, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in Maryland, within the said limits, without first obtaining a license so to do, for which license (to be renewed annually), a sum of three hundred dollars was to be paid. It was held that this statute imposed a discriminating tax upon non-resident traders, trading in the limits mentioned, and that it was, pro tanto, repugnant to the federal constitution and void.

In Chemung Canal Bank vs. Lowery, 93 U. S. 72, it was held that a state statute of limitations which provided, in effect, that when the defendant is out of the state, the statute of limitations shall not run against the plaintiff, if the latter resides in the state, but shall if he resides out of the state, is not unconstitutional as in violation of the provision that the citizens of each state shall be entitled to all

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the privileges and immunities of citizens in the several states.

The reason given in Chemung Canal Bank vs. Lowery (93 U. S. 77), supra, were: 1. That if the statute did not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the state where the parties reside, and yet if the defendant should be found in Wisconsin, a suit could be sprung upon him after the claim had been forgotten, and the laws of Wisconsin would thus be used as a trap to catch the unwary defendant, after the laws which had always governed the case had barred any recovery. 2. That a personal obligation is due at the domicile of the obligor. It is the duty of the debtor to seek the creditor and pay him his debt at the residence of the latter. Not doing this he is guilty of lanches against the law of the creditor's domicile, as well as his own, but he evades this law by absenting himself from the jurisdiction. As long as he does that the statute of limitations of that jurisdiction ought not to run to the creditor's prejudice.

In McCready vs. Virginia, 94 U. S. 395, the court said:

"We think we may safely hold that the citizens of one state are not invested by this clause of the constitution with any interest in the common property of the citizens of another state. If Virginia had provided by law for the sale of its own vast public domain and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other states had a constitutional

right to the enjoyment of this privilege of Virginia citizenship, and the reason is obvious: the right thus granted is not a privilege or immunity of general, but of special citizenship. It does not belong of right to citizens of all free governments, but only to the citizens of Virginia on account of the particular circumstances in which they are placed."

In Booth vs. Lloyd, 33 Fed. 593, it was held that the Maryland act of 1884, Sec. 518, prohibiting the use of vessels to buy oysters on the Chesapeake bay unless a license was obtained from the state therefor, conditioned upon a twelve months residence in the state, and the payment of a tonage fee, was unconstitutional, as denying citizens of other states privileges enjoyed by those of Maryland.

In Shirk vs. City of Lafayette, 52 Fed. 857, it was held that Rev. St. Ind., Sec. 2988, which provides that it shall be unlawful for any person, association or corporation to appoint a non-resident a trustee in a deed, mortgage or other instrument in writing, except wills, for any purpose whatever, is in conflict with the constitution of the United States, Art. 4, Sec. 2, which provides that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

Cases cited in the opinion, Bryant vs. Richardson, 126 Ind. 145 (25 N. E. Rep. 807); Robey vs. Smith, 131 Ind. 342; Farmers Loan & Trust Co. vs. Ry. Co., 27 Fed, 146,

In the latter case Gresham, J., held that a citizen of the United States has a right to hold real and personal property, absolutely, or in trust for his own benefit, or in trust

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for the benefit of himself and others, in any state in the Union.

In Frazer vs. M. & T. Co., 82 Fed. Rep. 257, it was held that the act of Pennsylvania of June 5, 1897, imposing on every employer of foreign born unnaturalized male persons over the age of 21 years, a tax of three cents a day for each day that each of such persons may be employed, was unconstitutional.

In Holden vs. Hardy, 46 P. R. (Utah), 759, (1st col.), it was held (citing Slaughter House Cases, 16 Wall. 76), that the constitutional provision did not create the "privileges and immunities" referred to, and "threw around them in that clause no security for the citizen of the state in which they were claimed and exercised. Its sole purpose was to declare to the several states that whatever those rights as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of the citizens of other states within your jurisdiction."

In Steed vs. Harvey, 18 Utah 367, the court said:

"He is entitled to the same protection of life, liberty and property, the laws of such state extend to its own citizens. The privileges and immunities of a citizen of one state include these rights with others. There are privileges, however, which states give only to their own citizens, rights which they will not permit citizens of other states to acquire and possess, such as the election franchise, the

right to sit upon juries and the right to hold public office. These rights they make dependent on citizenship. If the sovereignty were to entrust the elective franchise to the citizens of another only in part, it would not rest upon the will of its own citizens; or if a state were to permit its offices to be filled, and their functions to be exercised, by citizens of other states, its citizens, to that extent, would not enjoy the right of self-government.

In In re Stanford Estate, 126 Cal. 112, it was held that under the Const. U. S. Art. 4, Sec. 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, and Rev. St. U. S. Sec. 1978, providing that all citizens of the United States shall have the same right in every state as is enjoyed by them while citizens thereof to inherit property, the provisions of the collateral inheritance tax law (Act March 23, 1893, as amended by Sec. 897, p. 77), making a distinction between resident and non-resident relatives, and excluding non-resident relatives from its exceptions, was invalid.

In Black vs. Seal, 6 Houst. (Del.) 541, it was held that the discrimination in the Delaware statute between a citizen residing in the state and a non-resident in regard to issuing a writ of capias ad respondendum against them, the statute requiring in the former an affidavit of fraud previously filed, but none as to the latter, is in conflict with Const. U. S., Art. 4, Sec. 2, and amendment Art. 14, Sec. 1.

In Caldwell vs. Armour, 1 Pennewill, 545, it was

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held that the laws of Del. c. 192, Sec. 1, providing that a summons in an action may be served on a non-resident doing business in the state by branch establishment or agency, by leaving a copy thereof with the agent or at the usual place of business of the non-resident, was repugnant to Const. U. S., Art. 4, Sec. 2.

In Douglas vs. Stephens, 1 Del. Ch. 465, it was held that the statute (1 Del. laws, p. 81), giving preference to creditors within the state by providing that no foreign debt shall be paid by an executor or administrator until the debts due the inhabitants of the state be first secured and paid, conflicted with Const. U. S., Art. 4, Sec. 2, which provides "that a citizen of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

In In re Opinion Supreme Court, 25 N. H. (5 Fost.) 537, it was held that an act providing that all conveyances, mortgages, etc., which either in whole or in part shall have been for, or on account of, spirituous or intoxicating liquors, should be utterly null and void, against all persons and in all cases, and that no action of any kind should be maintained, either in whole or in part, for intoxicating liquors sold in any other state or country, was obnoxious to Const. U. S. Art. 4, Sec. 2, for it assumed to deprive the citizens of other states of rights of action to redress injuries to property.

In Davis vs. Pierce, 7 Minn. (3 Gil.) 13, (82 Am. Dec. 65), it was held that act of Feb. 14, 1862, suspending the

privileges of all persons aiding in the Rebellion of prosecuting and defending actions and judicial proceedings, in so far as it applied to citizens of other states, was in violation of Const. U. S. Art. 4, Sec. 2.

In In re Courts for Trial of Infants, 14 Pa. Co. Ct. Rep. 254, (Am. Dig. 1894, p. 735, Sec. 141), it was held that act of June 12, 1893, providing that infants under 16 years of age should be confined and tried separately from other criminals, conflicts with the provision of the constitution, which declares that all courts shall be open, and that all laws relating to the courts shall be general and of uniform operation.

In State vs. Duckworth, 51 Pac. Rep. (Idaho), 458, 459, a statute of Idaho declared it to be unlawful to bring sheep into that state without first having them "dipped," as provided in said act, and it was held that the habitat of "scab" in sheep was not confined to any one state, but that sheep had "scab" in Idaho, and that to require sheep to be "dipped" before being brought into the state was an unjust discrimination against outside sheep, and the court said:

"The burden placed upon the shipper or driver of sheep would be very great if, arriving at the state line, he must notify a sheep inspector, and, in case such inspector pronounced the sheep sound and healthy, they must be 'dipped' once before entering such state. Under the guise of inspection and quarantine, said sections place unnecessary burdens and restrictions upon bringing sheep into this state for any purpose whatever, or transporting them through

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the state to the markets of the East, and make unnecessary and prejudicial discriminations against sheep whose owners may desire to bring them into the state; and they are repugnant to the provisions of the federal constitution. (Commerce clause and Art. 4, Sec. 2.)"

In State of Minnesota vs. Barber, 136 U. S. 313, a statute was declared invalid which required dressed meat to be inspected 24 hours before it was offered for sale.

In State vs. Wiggin, 64 N. H. 508, it was held that Gen. Laws N. H. c. 119, Sec. 9, as amended by Laws 1879, c. 34, which fixed the price of licenses to sell and put up lightning rods at $100 to citizens of that state, and $500 to citizens of other states, did not give the citizens of other states all the privileges and immunities of citizens of that state.

In Rush vs. Holliway, 20 Rep. (Ky.) 9, a Kentucky statute pronounced void all contracts made by peddlers without a license. Subsequently an amendatory act was passed relieving from its operation citizens of the state, and it was held that such amendatory act was void, as discriminating against citizens of other states.

In Sprague vs. Fletcher, 69 Vt. 69, it was held that a Vermont statute which allowed residents only to deduct their debts from their personal tax returns was unconstitutional.

In Marsh vs. Steele, 9 Neb. 96 (1 N. W. Rep. 896), it was held that the Code Civ. Proc., Sec. 200, which required an undertaking to be given in attachment in all cases, ex-

cept where the ground of the attachment was that defendant was a non-resident of the state, was not in violation of Const. U. S. Art. 4, Sec. 2. That constitutional provision must be confined to those privileges and immunities which are fundamental in their nature.

In Eingartner vs. Illinois Steel Co., 94 Wis. 70 and Cafrode vs. Gartner, 79 Mich. 332, it was held that a non-resident could maintain an action, in any case where a resident could maintain an action, and that the fact that both the plaintiff and defendant were non-residents of the state, and the action could be maintained at the domicile of both of the parties to the suit, gave the court no right or discretion to dismiss the action.

In Kimmish vs. Ball, 129 U. S. 127, it was held that the provision of the Iowa Code (Sec. 4059), that any one who had in his possession in the state, any Texas cattle which had been wintered north of the southern boundary of Missouri or Kansas should be liable for any damages that might accrue from allowing them to run at large, and so spreading Texas fever, did not deny to citizens of other states any rights and privileges accorded to citizens of Iowa. That the act prohibited everyone, whether citizens of Iowa or not, from bringing into or having diseased cattle in the state.

In Leisy vs. Hardin, 135 U. S. 100, the court said of Const. U. S., Art. 4, Sec. 2, that the "privileges and immunities thus secured are those fundamental rights and privileges which appertain to citizenship."

In Ex parte Lockwood, 154 U. S. 116, it was held that it was for the determination of the Virginia courts alone, to say who should practice law in that state, and the right to practice law was not such a privilege or immunity of a citizen of the United States as is guaranteed by the 14th amendment.

In Gulf C. & S. F. Ry. Co. vs. Ellis, 165 U. S. 150, it was held that act, Texas, April 5, 1889, providing that railroad companies failing to pay claims less than $50 for labor, damages, overcharges on freight or for stock killed, within 30 days after presentation thereof, should be liable for an attorney's fee not exceeding $10, was void, as depriving such companies of the equal protection of the laws.

In Slaughter House Cases, 16 Wall. 36, it was held that the privileges and immunities of citizens of the United States referred to in the second clause of the Fourteenth Amendment of the U. S. Constitution were those which arose out of the nature and essential character of the national government, the provisions of its Constitution, or its laws and treaties, made in pursuance thereof.

In U. S. vs. Cruikshank, 92 U. S. 543, it was held that the Fourteenth Amendment added nothing to the rights of one citizen as against another. It simply furnished an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society.

In Iowa Central Ry. Co. vs. Iowa, 106 U. S. 389, it was held that it is not a right, privilege or immunity of a

citizen of the United States, within the meaning of Constitution Amendment 14, to have a controversy in the state prosecuted or determined by one form of action rather than by another.

In Magoun vs. Illinois Trust & Savings Bank, 170 U. S. 283, it is said:

"The provision of the fourteenth amendment forbidding the states to deny to any person within their jurisdiction the equal protection of the laws, does not require that the law shall have equality of operation, in the sense of an indiscriminate operation on persons merely as such, but on persons according to their relation. It does not prevent the states from distinguishing, selecting and classifying objects of legislation, within a wide range of discretion; but a classification must be based upon some reasonable ground, some difference which bears a just and proper relation to the classification, and not a mere arbitrary selection."

In Tinsley vs. Anderson, 171 U. S. 101, it was said:

"The right to the equal protection of the laws is not denied by a state court where the same course of procedure applied to the person in question would have been applied to any other person in the same state under similar circumstances."

In Lemmon vs. The People, 20 N. Y. 262, 608, Justice Denio, in delivering the opinion of the court, said:

"The language (of Sec. 2, Art. 4., Const. U. S.), is that they shall have the privileges and immunities of citizens in the several states. In my opinion the meaning is, that in a

given state, every citizen of every other state shall have the same privileges and immunities—that is, the same rights—which the citizens of that state possess. In the first place, they are not to be subjected to any of the disabilities of alienage. They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which would place them in a worse situation than a proper citizen of the particular state, would be unlawful."

In Magill vs. Brown, Brightly N. P. 346 (16 Fed. Cas. 408; Case No. 8952), it was held that one of the privileges secured in every state to the citizens of the several states by Art. 4, Sec. 2, of the Constitution of the United States, is that of exemption from the law of alienage and the consequent right of enjoying property in the several states; and accordingly, a devise or bequest cannot be defeated on the ground that the beneficiary is a citizen or a corporation of another state than the testator.

In Fecheimer vs. City of Louisville, 84 Ky. 306, it was held that an ordinance of the City of Louisville imposing a higher tax on the business of a merchant of another state than that of a resident of the city, was in violation of Sec. 2, Art. 4, Constitution of the United States, and void.

In Gallup vs. Schmidt, 183 U. S. 300, it was held that a non-resident executor is not denied any rights and privileges secured to him by the Constitution of the United States because Ind. Rev. Stats., Sec. 8560, under which omitted property belonging to the estate was added to the

tax duplicate by the county auditor, contains no provision for notice to any person not a resident of the county in which such omitted property is proposed to be assessed, where he not only had an opportunity to appear and set up any defense that he had, but actually did appear, and after his demurrer and motion to dismiss had been overruled, answered and was fully heard in the trial court, and his objections to the findings and rulings of that court have been heard and considered by the Supreme Court of the state.

In Douglass vs. Stephens, 1 Del. Ch. 465 (decided in 1821), a statute of Delaware was under consideration which discriminated in favor of resident creditors of a dead man, Chancellor Ridgely, in that case said (page 473):

"The difficulty is to discover in what instance any privilege or immunity of a citizen of one state may be abridged in another. He may purchase and hold lands by any of the several modes by which real estate may be acquired. He may take by descent, where the title is vested in him by the operation of law. He may obtain goods and chattels, in all the forms and varieties peculiar to personal property. He may be an executor, administrator, or witness. He may prosecute every species of suit both in law or in equity, and in short, as to every civil right, I know no difference between him and a citizen of the state."

And again (page 474):

"The only reasonable construction to be given to this clause (Sec. 2, Art. 4, Const. U. S.), is that of placing all

citizens of the United States on the same footing, and extending to them a perfect equality in their rights, privileges and immunities. If one citizen has a privilege to which others are not entitled, then they are not entitled to all the privileges and immunities of citizens in the several states."

From the cases cited above it is apparent that the "privileges and immunities" of the citizen, guaranteed by the federal constitution, are those which belong to citizenship. (Conner vs. Elliott, 18 How. 591, 593.) That they are those fundamental rights and privileges which appertain to citizenship, (Leisy vs. Hardin, 135 U. S. 100), and which are common to the citizens in the latter states, under the constitution and laws of each, by virtue of their being citizens, (Paul vs. Virginia, 8 Wall. 168). That of the Const. U. S., Art. 4, Sec. 2, "its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of the citizens of other states within your jurisdiction." (Slaughter House Caset, 16 Wall. 36, 37; Holden vs. Hardy, 46 R. P. (Utah) 759; Steed vs. Harvey, 54 P. R. (Utah) 1011, 1012). That it placed the citizens of each state upon the same footing with the citizens of the other states, so far as the advantages resulting from citizenship in those states is concerned, and relieved them from the disabilities of alienage in other states; that it inhibited discriminating legislation against them by other states, and

insured to them the same freedom possessed by the citizens of those states, in the acquisition and enjoyment of property, and the equal protection of the laws, (Paul vs. Virginia, 8 Wall. 168, 180).

That the fourteenth amendment Const. U. S., added nothing to the rights of one citizen against another, but simply furnished an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society, (U. S. vs. Cruikshank, 92 U. S. 543). That the equal protection of the laws is given where the same course of procedure is applied to the person in question, as would have been applied to any other person in the same state under similar circumstances, (Tinsley vs. Anderson, 171 U. S. 101), and it implies not only equal accessibility to the courts for the prevention or the redress of wrongs and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind, (In re Ah Fong, 3 Sawy. 144; Ho Ah Kow vs. Numan, Sawy. 552; In re Tiburcio Parrott, 1 Fed. 481).

One of these "fundamental rights of citizenship" is the right to take, hold and enjoy property (Corfield vs. Coryell, Wash. (C. C.) 371, Paul vs. Virginia, 8 Wall. 168; Blake vs. McClung, 172 U. S. 314), and such right must be protected and secured by the laws of the state in the same manner as the property of the citizens of the state is protected, Campbell vs. Morris, 3 Har. & McH. (Md.) 554; Blake vs. McClung, 172 U. S. 314).

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Our examination of the authorities has failed to disclose a single case decided by this court where a state statute has been upheld which discriminated against a non-resident in his right of access to the courts of the state, or his right to take, hold and enjoy property.

In Conner vs. Elliott, 18 How. 591, the property right in dispute was the community of gains between married persons given by law of the state where the marriage was contracted—community property. The court held in that case that the right to such community property was a right which was attached to the contract of marriage by the lex loci contractus, irrespective of the citizenship of the parties, and that the state law did not discriminate between citizens of the state and other persons, but discriminated between contracts only.

In McCready vs. Virginia, 94 U. S. 395, the property right in dispute was the right of common of fishery (the planting of oyster beds), in the tide waters of Virginia—"common property" of the state. But in Booth vs. Lloyd, 35 Fed. 593, a fundamental right in property was in dispute, and it was there held that a state statute was invalid which prohibited the use of vessels to buy oysters in the Chesapeake bay, unless a license was obtained so to do, conditioned on a residence of twelve months in the state, and the payment of a tonnage fee. The question in dispute was the right to do business in the state of Maryland.

Chemung Canal Bank vs. Lowery, 93 U. S. 72; Central Loan & Trust Co. vs. Campbell Com. Co., 173 U. S. 346;

and Marsh vs. Steele, 9 Neb. 96, do not involve any fundamental rights of the citizen. In the first case a state statute of limitations was held to be valid that provided that when the defendant was out of the state, the statute should not run against the plaintiff, if the plaintiff resided in the state, but should, if he resided out of the state. In the second case, a state statute which required the plaintiff to give bond as a prerequisite to the issuance of an attachment against a resident, but required no such bond where the attachment was against property of a non-resident, was held not to operate as a denial of due process of law, or of the equal protection of the laws (Const. U. S., Art. 4, Sec. 2, not cited or commented on by the court or counsel). In the third case a state statute was held to be valid which required an undertaking to be given in attachment, in all cases, except where the ground of attachment was that defendant was a non-resident of the state, as it did not deny the non-resident a privilege or immunity which was fundamental in its nature.

Anyone who thinks he sees in any of the above cases a right in the state to discriminate against a non-resident in a fundamental right, merely mistakes the shadow for the substance. The fundamental right in those cases was the right to be heard in court, on equal terms with the resident of the state, and such right is fully protected when the non-resident is given the same right to have his case tried on like evidence and by the same jury or court as a resident of the state would have. All other matters of form which do

not impair the fundamental right, affect merely the remedy and not the right.

To illustrate, take the matter of the sale of real estate for delinquent taxes. Many matters of procedure must be gone through with by the taxing officers, and a failure to perform any of them would avoid a tax deed in the absence of a healing statute, but a compliance with all of these matters of procedure by the taxing officers can be dispensed with or "cured," excepting in the case of three essential requirements, (1) in the assessing of the property for taxes, (2) in the notice that the property will be sold for the delinquent taxes, and, (3) in the notice that a deed will be issued to the tax purchaser unless the property is redeemed, and a compliance with these essentials cannot be dispensed with or "cured" even by a legislative enactment.

The difference between matter of substance and matter of form is forcibly illustrated by the case of Capital Traction Co. vs. Hof., 174 U. S. 1, where it was held that the constitutional right of a trial by jury was not violated by a statute which allowed a trial by jury in the appellate court, but required the appellee, in order to take his appeal, to give bond.

In ex parte Lockwood, 154 U. S. 116, (14 S. C. R. 1082), the question in dispute was the right of Miss Belva A. Lockwood, who had been duly licensed to practice in the courts of the District of Columbia, to practice law in the courts of Virginia. She was denied the right solely because she was a woman, and it was held that whether

women should be admitted to practice law in Virginia was a matter for the determination of the Virginia courts alone, and that the action of the court in refusing her a license did not deny her a privilege of a citizen of the United States, within the meaning of the fourteenth amendment.

The right to practice law is not a fundamental right of citizenship, but is a special privilege granted by the law and the courts, based on requirements as to the learning and good character to be ascertained and determined on examination of the applicant.

Let us turn now to the cases grounded on the fundamental right of a non-resident to sue in the courts, and to take, hold and enjoy property.

The leading case is Blake vs. McClung, 172 U. S. 239, where a statute of the State of Tennessee, which discriminated between residents and non-residents of that state in the distribution of the assets of an insolvent foreign corporation was declared invalid.

In Douglas vs. Stephens, 1 Del. Ch. 465, a state statute which provided that no foreign debt should be paid by any executor or administrator until the debts due the inhabitants of the state were first secured and paid, was declared invalid.

In In re Stanford's Estate, 126 Cal. 112, the collateral inheritance tax law of the state of California, which made distinctions between resident and non-resident relatives, and excluded non-resident relatives from its exceptions, was declared to be invalid.

In each of the above cases the legislation in question was a matter of state concern, but the "privilege" of the non-resident in each of these cases was a fundamental right of citizenship.

In Eingartner vs. Illinois Steel Co., 94 Wis. 70, and Cafrode vs. Gartner, 79 Mich. 332, the "privilege" in question was the right to sue, and it was held that a non-resident could maintain an action in any case where a resident could maintain such an action. In other words, that the right to sue was a fundamental right of citizenship.

In Black vs. Seal, 6 Houst. 541, a state statute which discriminated between a resident and a non-resident in regard to issuing a writ of capias ad respondendum against them, requiring in the former, and not in the latter, an affidavit of fraud previously filed, was declared to be invalid.

In Caldwell vs. Armour, 1 Pennewill (Del.) 545, a state statute which provided that a summons in an action might be served on a non-resident doing business in the state by branch establishment or agency, by leaving a copy thereof with the agent or at the usual place of business of the non-resident, was declared to be invalid. The matter in dispute in that case was the question of the validity of the service of process, an essential requisite of the notice of the hearing that a defendant is entitled to as of right before a valid judgment can be pronounced against him; is a matter of substance and not of form.

In re Opinion Supreme Court, 25 N. H. 537, a state statute which provided that no action of any kind

should be maintained, either in whole or in part, for intoxicating liquors sold in any other state or country, was declared to be invalid as it assumed to deprive the citizens of other states of rights of action to redress injuries to property.

Decisions grounded on unjust discriminations against non-residents are common. State statutes have been declared invalid which imposed on every employer of foreign born unnaturalized male persons over the age of 21 years a tax of 3 cents a day (Frazer vs. Co., 82 Fed. 257); which allowed the residents only to deduct their debts from their personal tax returns (Sprague vs. Fletcher, 69 Vt. 69); which required a non-resident to take out and pay for a license to trade in goods, where no license was required of a resident trader (Ward vs. Maryland, 12 Wall. 418); which discriminated between residents and non-residents in the price to be paid for licenses to sell and put up lightning rods (State vs. Wiggin, 64 N. H. 508), and which pronounced void all contracts made by non-residents of the state who peddled without a license (Rush vs. Holliway, 20 Repr. (Ky.) 9).

In People vs. City of Detroit, 70 Mich. 534, a statute which denied to liquor sellers the right to become surety on the bond required by the statute, was declared to be invalid, as abridging the privileges and immunities of the citizen.

If the privilege of signing another man's bond is a fundamental right of citizenship, surely the right of a man

to name his executor, and the right of such executor to execute such trust and get paid for so doing, is a fundamental right of citizenship.

If there could be any doubt that the right of George Manley to nominate and appoint an executor was a fundamental right of citizenship, and inhered in his right to take, hold and enjoy real estate in the State of Kansas, such doubt is dispelled by the cases of Shirk vs. City of Lafayette, 52 Fed. 857; Farmers' Loan and Trust Co. vs. Ry. Co., 27 Fed. 146; Bryant vs. Richardson, 126 Ind. 145, and Roby vs. Smith, 131 Ind 342, where it was held that a statute of Indiana which provided that it should be unlawful for any person to appoint a non-resident a "trustee in a deed, mortgage or other instrument in writing, except wills, for any purpose whatever," was invalid.

In Farmers' Loan & Trust Co. vs. Ry. Co., supra, at page 149, Judge Gresham said:

"The right is asserted to deny to persons, associations, or corporations, within or without the state, power to convey to any person in trust, not a resident of Indiana, real or personal property within the state. This is a plain discrimination against the residents of other states. If Indiana may disqualify a resident of another state from acting as a trustee in a trust deed or mortgage which conveys a real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the state might prohibit citizens of other states from holding proptrty within the state, and to that extent

from doing business within the state. No state can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real or personal propery in any state in the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship" (citing Const. U. S., Art. 4, Sec. 2).

Discriminations against a non-resident are not alone found in the express language of a statute, but may result from decisions of the courts of the state (Chicago, B. & Q. R. Co. vs. Chicago, 166 U. S. 226; Nashville, etc., R. Co. vs. Taylor, 86 Fed. 168). To allow a non-resident executor to be attached and the property of the estate sold to pay the judgment in the attachment would, in effect, (1) allow the estate that is being administered upon by such non-resident executor to be sequestered by proceedings in the district court, when, under the law, an estate that is being administered upon by a resident executor cannot be so sequestered, for the probate court would in such case, have "exclusive jurisdiction" in the case of such estate (Keith vs. Guthrie, 59 Ks. 200, 201); (2) it would subject such estate to the costs and expenses of determining, by the proceedings in the district court, the validity and extent of a claim against the estate, when in the case of a resident executor the costs of such a proceeding can in no event be allowed against the estate of the dead man, (Par. 2870 G. S. Ks.,

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1889); (3) it would deprive the dead man of his fundamental right of nominating one of his immediate friends and neighbors as his executor, if the person desired as an executor, happened to be a non-resident of the state where some of the property of the dead man was situate, and (4) it would deprive the non-resident who was nominated as executor of his valuable right to administer on the estate, and get the fees for so doing.

In the first case named the discrimination would not only be against non-resident executors, but it would also be against residents of the state where the property was situate, allowing an attachment against the property of a resident of the state who had died and who had appointed a non-resident of the state as his executor, and denying such attachment where a resident of the state was appointed an executor. A discrimination resulting solely and entirely by reason of alienage of the executor.

The discriminations are far more glaring than they were in State vs. Duckworth, 51 Pac. Rep. (Idaho) 456, and State of Minnesota vs. Barber, 136 U. S. 313; where under the guise of health laws state statutes made requirements as to inspections, etc., of sheep and dressed meats, which had a tendency to exclude foreign sheep and dressed meats.

If the attachment in this case is sustained, how can it be said that whatever rights the laws of Kansas have given to resident executors, they have also given to non-resident executors, "neither more nor less" (Slaughter House Cases, 16 Wall. 36, 37)?

How can it be said that the non-resident executor, in this case, has been placed "upon the same footing" with a resident executor "so far as the advantage resulting from citizenship" in the State of Kansas is concerned, or has been "relieved from the disabilities of alienage" in the State of Kansas, or has had insured to him "the same freedom possessed by the citizens of those states?"

There is nothing in the contention of the defendant in error that a foreign executor is not a "citizen," and cannot claim the rights of a citizen of New Jersey.

Gallup vs. Schmidt, 183 U. S. 300.

Douglass vs. Stephens, 1 Del. Ch. 465, 473.

Farmers' Loan & Trust Co. vs. Ry. Co., 27 Fed. 146.

Shirk vs. City of Lafayette, 52 Fed. 857.

Roby vs. Smith, 131 Ind. 342.

SIXTH: THE JUDGMENT OF THE DISTRICT COURT OF ATCHISON COUNTY, KANSAS, OF DECEMBER 13, 1897, WAS RENDERED BY THAT COURT IN A CASE WHERE JURISDICTION WAS OBTAINED OVER THE PERSON OF THE PLAINTIFF IN ERROR, BY ATTACHMENT OF THE PROPERTY IN HIS CHARGE, AS EXECUTOR OF THE ESTATE OF A DEAD MAN, AND AS THE ATTACHMENT WAS UNAUTHORIZED, ILLEGAL AND VOID, THE COURT OBTAINED NO JURISDICTION OVER THE PERSON OF THE PLAINTIFF IN ERROR, OR OVER THE PROPERTY IN HIS

CHARGE, AND SUCH JUDGMENT BEING ABSOLUTELY VOID, WAS NOT RES JUDICATA, AND THE PLAINTIFF IN ERROR HAD A RIGHT TO HAVE IT SET ASIDE, AT ANY TIME, BY MOTION.

Jurisdiction over the subject matter cannot be given by consent, and when for any cause a court has no jurisdiction of the subject matter in an action, neither the appearance and consent by the parties, nor pleading to the merits and going to trial, will give the court jurisdiction.

12 Am. & Eng. Enc. L. (1st Ed.), p. 301, n. 2.

12 Am. & Eng. Enc. L. (1st Ed.), p. 303, n. 1.

Want of jurisdiction may be taken advantage of at any time in the trial court, even after judgment has been entered. The want of jurisdiction in the trial court may be enquired into in the appellate court.

12 Am. & Eng. Enc. L. (1st Ed.), pp. 306-307, par. 12, cit.,

Foreman vs. Carter, 9 Ks. 674.

A court may be asked to determine its own jurisdiction in four different ways.

1. Motion to dismiss the suit for want of jurisdiction may be made at any time. A motion to dismiss may also be made in an appellate court for want of jurisdiction in the lower court.

2. A demurrer on the ground of want of jurisdiction may be taken when the want of jurisdiction is apparent in the face of the record.

3. A plea, in abatement of the action, to the jurisdic-

tion of the court, may be entered when the want of jurisdiction is not apparent on the face of the record.

4. A motion to vacate the judgment.

12 Am. & Eng. Enc. L. (1st Ed.), p. 309.

An appellate tribunal may be asked to determine whether the lower court had jurisdiction in the case, or having jurisdiction, had properly used it by,

1. A writ of certiorari.

2. A writ of prohibition. This is the only remedy by which the lower court can be restrained from attempting to exercise a jurisdiction which it does not have.

12 Am. & Eng. Enc. L. (1st Ed.), pp. 310-311.

"A judgment entered by a court without jurisdiction is void and will be held such in a collateral proceeding, or on appeal in the same proceeding. When a court transcends its jurisdiction its judgment will also be void."

12 Am. & Eng. Enc. L. (1st Ed.), p. 311, par. 13.

"A judgment of a court having no jurisdiction either of the person or of the subject matter, is a nullity."

Butcher vs. Bank, 2 Ks. 70.

Mastin vs. Gray, 19 Ks. 461.

In any case, jurisdiction of the court over the subject matter, is the power of the court to render the judgment that it does render.

In Rose vs. Himely, 4 Cranch. 241, the controversy was over a cargo, which, after being shipped from a port of Santo Domingo, in possession of the brigands, was captured by a French privateer, and carried to Barracoa, a small

port on the island of Cuba, where it was sold by the captor. The cargo having been brought by the purchaser into the State of South Carolina, was libeled in the court of admiralty, by the original American owner. The purchaser defended his title by a sentence of condemnation procured by a tribunal sitting in Santo Domingo, after the property had been libeled in the court of this country, and by an order of sale made in pursuance of said judgment. It was contended that the court pronouncing the sentence, of necessity, decided in favor of its jurisdiction, and if its decision was erroneous, the error should be corrected by the superior tribunals of its own country, not by those of a foreign country. In answering this contention Chief Justice Marshall, who delivered the opinion of the court, said:

"This proposition certainly cannot be admitted to its full extent. A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever.

"The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power, under which it acts, must be looked into, and its authority to decide questions which it professes to decide, must be considered.

"But although the general power by which a court takes jurisdiction of causes must be inspected, in order to

determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed may be inquired into for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example: in every case of foreign sentence condemning a vessel as a prize of war, the authority of a tribunal to act as a prize court must be examinable. Is the question whether the vessel condemned was in a situation to subject her to the jurisdiction of the court also examinable? This question, in the opinion of the court, must be answered in the affirmative.

"Upon principle, it would seem that the very operation of every judgment must depend on the powers of the court to render that judgment; or in other words, on its jurisdiction over the subject matter which it has determined. In some cases that jurisdiction unquestionably depends as well as on the state of the thing, as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered

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by that tribunal which is to decide on the effect of the sentence."

This case was followed in Scott vs. McNeal, 154 U. S. 34.

Want of jurisdiction may be shown either as to the subject matter or the person, or, in proceedings in rem, as to the thing, and a record contrary to the fact as to any of these matters is not res adjudicata, but may be impeached collaterally.

In Thompson vs. Whitman, 18 Wall. 457, it was held that where, by a law of New Jersey, non-residents were prohibited from raking clams and oysters in the waters of that state, under penalty of forfeiture of the vessel employed; and any two justices of the county in which the seizure of the vessel was made, were authorized, on information given, to hear and determine the case, if the seizure was not made in the county where the prosecution took place, the justices of that county had no jurisdiction, and that this fact might be inquired into, in an action for making such seizure brought in New York, notwithstanding the record of a conviction was produced which stated that the seizure was made within such county; that want of jurisdiction may be shown either as to the subject matter or the person, or, in proceedings in rem, as to the thing

In In re Sawyer, 124 U. S. 200, 221, it was held that an injunction issued by the Circuit Court of the United States, for the District of Nebraska, restraining the city authorities of Lincoln, Nebraska, from proceeding to re-

move a police judge from office, was void, and could be disregarded with impunity. And on page 493, the court said:

"The case can not be distinguished in principle from that of a judgment of the common bench in England, in a criminal prosecution, which is coram non judice; or the case of a sentence passed by the circuit court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury."

S. P. State vs. Milligan, 3 Wash. St. 144.

In United States vs. Walker, 109 U. S. 258, it was held that a justice of the Supreme Court of the District of Columbia had no authority, under section 976 R. S. Dist. Col., to pass an order directing an administrator, who has been removed, to pay over to his successor the proceeds of a debt due the decedent, which he had collected, as such property are not assets or estate of the decedent; and as such an order was not within the jurisdiction of the court it was void and not conclusive in an action on the administrator's bond to recover the money so collected.

In that case the court (p. 265) said:

"The next point taken by the plaintiff in error, that the decree of the justice of the Supreme Court of the district directing the administratrix to pay over the fund to her successor, was conclusive in this suit, we are of the opinion that, in making the order referred to, the Supreme Court of the district exceeded its jurisdiction, and that its order is for that reason void. Its authority, and its sole authority

for making the order, is to be found in section 976, above referred to, of the revised statutes relating to the District of Columbia: 'The court shall have further power to order and require assets or estate of the decedent, which may remain unadministered, to be delivered to the newly-appointed administrator de bonis non.' It appears from the pleadings in the case that the money ordered to be paid was the proceeds of a debt due the decedent which his administratrix had collected. It was not, therefore, as we have seen, assets or estate of the decedent. It was the property of the removed administrator. The court was therefore without power to direct the payment of the money to the administrator de bonis non. Although a court may have jurisdiction over the parties and the subject matter, yet is it makes a decree which is not within the powers granted to it by the law of its organization its decree is void. The limitation was well expressed by Mr. Justice Swayne in Cornett vs. Williams, 20 Wall. 226, when he said: 'The jurisdiction having attached in this case, everything done within the power of that jurisdiction when collaterally questioned, is held conclusive of the rights of the parties unless impeached for fraud.'

"The case of Bigelow vs. Forest, 9 Wall. 339, is in point. It was an action of ejectment. Bigelow, who was defendant in the court below, relied for title on a sale made under a decree of the United States District Court rendered in a proceeding for the confiscation of the premises sued for under the act of July 17, 1862. Referring to this de-

cree, Mr. Justice Strong, speaking for this court, said: 'Doubtless a decree of a court having jurisdiction to make the decree cannot be collaterally impeached, but under the act of congress the district court had no power to order a sale which should confer on the purchaser rights outlasting the life of French Forrest.' And the judgment of the court was, that so much of the decree of the district court as was in excess of its powers was void.

"In Ex parte Lange, 18 Wall. 163, Mr. Justice Miller, delivering the opinion of the court, after stating that the circuit court had exceeded its authority in pronouncing sentence upon Lange, and its judgment was therefore void, said:

"'It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case.'

"In the case of Windson vs. McVeigh, 93 U. S. 274, Mr. Justice Field, after a review of the cases bearing upon this subject, announces their result as follows:

"'The doctrine invoked by counsel, that when a court has once acquired jurisdiction it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but is subject to many qualifications in its application. It is only correct when the court proceeds, after acquiring jurisdiction of the

cause, according to established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it.'

"In this case the statute gave the court power, on the removal of an executor or administrator, to order the assets of the decedent, which might remain unadministered, to be delivered to the administrator de donis non. The court made an order directing the delivery of the proceeds of the administered assets. This was beyond the power conferred by the statute, and not within the jurisdiction of the court. The order was therefore void."

In Noble vs. Union River Logging Co., 147 U. S. 165, it was held that the secretary of the interior has no authority to amend the action of his predecessor in office approving the location of a railroad right of way over public lands under the act of March 3, 1875, on the ground that such approval was obtained by misrepresentation and fraud, and that the railroad was not used as a common carrier for hire, but merely to carry property belonging to its owners, for the existence of the railroad with the duties of a common carrier was a quasi jurisdictional fact, which the prior secretary had authority to determine, and his action therein was not subject to collateral attack.

And the court, speaking by Justice Brown, said:

"The position of the defendants in this connection is that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a

jurisdictional fact, without which the secretary has no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and his want of jurisdiction to approve the map may be set up as a defense to this suit.

"It is true, that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings and without which the act of the court is a mere nullity; such, for example, as the service process within the state upon the defendant in a common law action (citing cases); the seizure and possession of the res within the bailiwick in a proceeding in rem (citing cases); a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged (citing cases). So, if the court appoint an administrator of the estate of a living person, or in a case where there is an executor capable of acting (citing cases), or condemns as lawful prize a vessel that was never captured (Rose vs. Himely, 4 Cranch, 241, 269), or a court martial proceeds and sentences a person not in the military or naval service (Wise vs. Withers, 3 Cranch, 331), or the land department issues a patent for land which has already been reserved, or granted to another person, the act is not voidable merely, but void. In these and similar cases the action of the court or officer fails for want of jurisdiction over the person or sub-

ject matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

"There is, however, another class of facts which are termed 'quasi jurisdictional,' which are of necessity to be alleged and proved, in order to get the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally (citing cases); the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy (citing cases); the fact that there is insufficient personal property to pay the debts of a decedent when application is made to sell his real estate (citing cases); the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors (Thompson vs. Tolmine, 2 Pet. 157); and others of a kindred nature where the want of jurisdiction does not go to the subject matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act (citing cases). In this class of cases, if the allegation be properly made, and the jurisdiction be found by the court, such finding is conclusive and binding in every collateral proceeding; and,

even if the court be imposed upon by false testimony, its finding can only be impeached in a proceeding instituted directly for that purpose.

"This distinction has been taken in a large number of cases in this court, in which the validity of land patents has been attacked collaterally, and it has always been held that the existence of lands subject to be patented was the only necessary prerequisite to a valid patent. In the one class of cases it is held that, if the land attempted to be patented had been reserved, or was at the time no part of the public domain, the land department had no jurisdiction over it, and no power or authority to dispose of it. In such cases its action in certifying the land under the railroad grant, or in issuing a patent, is not merely irregular, but absolutely void, and may be shown to be so in any collateral proceeding (citing cases).

"Upon the other hand, if the patent be for lands which the land department had authority to convey, but it was imposed upon, or was induced by false representations to issue a patent, the finding of the department upon such facts cannot be collaterally impeached, and the patent can only be avoided by proceedings taken for that purpose."

See also,

Rogers vs. Clemmans, 26 Ks. 522.

Gille vs. Emmons, 58 Ks. 118.

Love vs. Blauw, 61 Ks. 496.

There is no difference between a void judgment and a void act of the legislature, both are nullities—mere pieces

of waste paper, and neither can be the basis of any valid claim.

A judgment rendered upon an unconstitutional law, and based entirely on such invalid act, is void, and can be collaterally attacked.

In Reed vs. Wright, 2 Greene, (Ia.), 15, it was held that an act of the legislature of the Territory of Wisconsin, entitled "an act for the partition of the half-breed land and for other purposes," approved January 16, 1838, and an act supplementary thereto, approved June 22, 1838, and also an act passed by the Iowa legislature, approved January 25, 1839, to repeal both of said acts, were repugnant to the ordinance of 1787, for the government of the people of the United States northwest of the Ohio river, and also to the organic laws of Wisconsin and Iowa, and were therefore void, and that judgments rendered by virtue of said laws were also void.

The case was an action of ejectment, called an action of right, to determine the title to certain land embraced in the reservation of lands for the use of the half-breeds of the Sac and Fox tribes of Indians, and lying between the Mississippi and Des Moines rivers. The legislature acts of Wisconsin and Iowa were based on the assumption that it was expedient in order to the settlement of the half-breed tract, that the title thereto should be investigated and partition and sale of the lands made.

Edward Johnson, David Brigham and Thomas S. Wilson, were appointed as commissioners under the Wisconsin

act to examine the titles, with power to administer oaths, etc., and for that purpose were clothed with as full and ample power as was possessed by the district court. The Iowa act, although it repealed the Wisconsin act, yet provided the manner in which the commissioners, who were appointed under the act, should proceed to collect the amount due them for services rendered in ascertaining the titles to the half-breed lands.

The lands in controversy were sold to pay the amounts so found to be due David Brigham and Edward Johnson, and were purchased by Reed, the plaintiff in error.

The contention in that case was identical with our contention in this case.

On page 19 the court said:

"By the counsel for the defendant in error, it was contended that the Wisconsin and Iowa acts were unconstitutional, and, consequently, all proceedings under them absolutely void. While, upon the other hand, the unconstitutionality of the acts was not only denied, but it was claimed, even if they were not constitutional, as the court rendering the judgments possessed general jurisdiction, it necessarily decided in favor of its jurisdiction, and if that was error, the party could have been relieved in an appellate court, upon writ of error; and that the propriety of the judgments could not be collaterally questioned."

The court held that the question was not res adjudicata; that a party is not obliged to sue out a writ of error to reverse a void judgment; he may wait until the judgment is

attempted to be enforced on proceedings under it, and then attack it collaterally; but with erroneous judgments it is different; if he sleeps upon his rights, his remedy is lost (p. 33).

That the line which separates error in judgment from the usurpation of power is very definite, and is precisely that which denotes the case where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record purporting absolute verity, in the other mere waste paper (p. 35, citing Voorhees vs. Bank, 10 Pet., 449).

That when a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void, and form no bar to a remedy sought even prior to a reversal, in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law trespassers. The distinction runs through all cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject, may be enquired into in every court where the proceedings of the former are relied on and

brought before the latter, claiming the benefit of said proceeding (p. 37, citing Elliott vs. Piersoll, 1 Pet., 340).

In Webster vs. Reed, 1 How. 437, the controversy was over the same proceedings as in Reed vs. Wright, 2 Greene (Ia.), 15, and the same result was arrived at, reversing Webster vs. Reed, 1 Morris (Ia.), 632, cited by defendant in error (Brief p. 23).

In Horan vs. Wahrenberger, 9 Tex. 313 (58 Am. Dec. 145), the controversy was in regard to an execution and sale under a judgment of the Supreme Court of Texas, rendered on an appeal from a judgment of the district court which reversed a judgment of a justice of the peace, in an action between the same parties. The judgment of the Supreme Court reversed the judgment of the District Court and affirmed the justice's judgment.

In its opinion, the court said (Hemphill, C. J.):

"On the principles settled in this case it is very clear that the district court acted without authority in revising the magistrate's judgment upon the merits, and that the judgment of the Supreme Court was equally without authority, for if the district court, or the court a quo, had no power, the appellate court had none (citing cases). And it is equally clear that this judgment without lawful power is a nullity, and cannot be used as evidence in support of the title set up by the appellant.

"The principle that a judgment of a court acting without authority is null seems to be of universal application. The only difference in its effect on the judgments of gen-

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eral and of special limited jurisdiction is, that in support of the former, jurisdiction is presumed, while in the latter it must be shown; but whenever the want of power is made to appear, its legal effect is the same, whatever may be the character of the jurisdiction."

And again:

"Another position assumed by the appellant is that it is no objection to his title that the law by which appeal was had from the justice's court, and final judgment in this court, was unconstitutional—or, in other words, that where a law, though unconstitutional, gives jurisdiction, the judgment is not a nullity. In support of this view, the case of Webster vs. Reid, 1 Morris (Ia.), 466, is cited. This case was revised on error in the Supreme Court of the United States (11 How. 437), and the judgment of the lower court was totally reversed. The judgments which had been supported by the lower court were by the Supreme Court declared nullities; and it was also held that when a judgment was brought collaterally before the court as evidence, it may be shown to be void on its face, for want of notice to the person against whom it is recovered, or for fraud."

In Arnold vs. Shields, 5 Dana 18 (30 Am. Dec. 669), it was held that a judgment of a justice court for a penalty in a sum within its jurisdiction, imposed by an unconstitutional statute, is not void, but merely erroneous, and may be corrected by an appeal to the circuit court; in such a case the magistrate has a right to adjudicate and decide

whether the statute under which such penalty is claimed is valid or void.

And the court at page 674 said:

"But if he had no jurisdiction, his judgment was not merely erroneous—it was void, and a ministerial officer might have been guilty of trespass in attempting to enforce it, by execution. Is the judgment void? A judgment, however erroneous, is not void merely because it was ordered on a void claim. It can never be void when the court which rendered it had jurisdiction over the suit brought to obtain it, and a right to decide whether the demand be legal and enforceable or not."

In Hickey vs. Stewart, 3 How. 750, it appeared that by the treaty of 1795 between the United States and Spain, Spain admitted that she had no title to land north of the thirty-first degree of latitude, and her previous grants of lands so situated were of course void. The country thus belonging to Georgia, was ceded to the United States in 1802, with a reservation that all persons who were actual settlers on October 27, 1795, should have their grants confirmed. Congress provided a board of commissioners to examine these grants and declared that their decision should be final. And it was held that the court of chancery of the State of Mississippi had no authornty to establish one of these grants which had not been brought within the provisions of the act of congress. The claim itself being utterly void, and no power having been conferred by congress on that court to take or exercise jurisdiction over

it, for purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the court void. And further held that a defendant in ejectment could not protect himself by setting up the record in such a suit, by which the plaintiff in ejectment had been ordered to convey all his title to the defendants in the ejectment, but in consequence of the party being beyond the jurisdiction of the court, no such conveyance had been made, even although the court of chancery, in following up its decree, had legally issued a habere facias possessionem, and put the defendant in ejectment in possession of the land, (equivalent to a judgment in ejectment, followed by like possession (p. 759).

See also:

Mastin vs. Gray, 19 Ks. 458.

Perry, Admr., vs. R. Co., 29 Ks. 420.

Amsbough vs. Exchange Bank, 33 Ks. 105.

Rogers vs. Clemmons, 26 Ks. 522.

Gille vs. Emmons, 58 Ks. 118.

In Seamster xs. Blackstock, 83 Va. 232, it was held that where a widow brought suit in the county court for the sole purpose of having dower assigned to her in her deceased husband's lands; the heirs at law who were infants, being made defendants, and the court not only directed an assignment of dower, but sua sponte, decreed a sale of the residue of the land belonging to the heirs, the decree of sale was void, and might be collaterally attacked for the reason that where the interest of each heir exceeded in value $300,

the county court could not, under Code Va., 1860, p. 581, Sec. 3, decree a sale of the lands in partition.

And further held that the fact that one of the heirs filed a petition in the case subsequently to the decree, alleging errors in the proceedings and attacking the validity of the decree and sale, and the court dismissed the petition, did not render the matter res adjudicata, or prevent the heir from afterwards attacking the decree collaterally.

And the court, in its opinion, said:

"Even if the decree of sale had been consistent with the averments and prayer of the bill, and in other respects regular, yet the decree would have been void, since the statute as it then was, prohibited the county court from decreeing a sale of land for partition when the interest of any party exceeded in value the sum of three hundred dollars, Code, 1860, p. 581, Sec. 3. And here the record affirmatively shows that the interest of each party exceeded in value that sum."

And on the question of res adjudicata the court said:

"In the present case it is unnecessary to express an opinion as to the effect of such a decree; for clearly, the decree of the circuit court, dismissing the petition, can have no greater force or effect than if it had been made by the county court before the removal of the cause to the circuit court; and we take it to be indisputable that no order or decree by a court can be clothed with vitality unless the court has jurisdiction to render it; so that, if the sale of the land in controversy was void, as we have shown it was, the

rights of the parties, the defendants in error, were not and could not be affected by the decree dismissing the petition, in which the jurisdiction of the county court to order the sale was denied. In other words, that decree constitutes no bar to the maintenance of the present action."

In Frankel vs. Satterfield, 9 Houst. 201, it was held that the judgment of a domestic court of record of general jurisdiction may be impeached in a collateral proceeding; and, if want of jurisdiction of the subject matter or of the parties, or of the res in an action in rem, be manifest from an inspection of the record, it will be regarded as a nullity, without having been so adjudged by a formal and direct proceeding for its vacation.

That upon the return of nulla bona upon a writ of foreign attachment under the statute of Delaware, the suit is at an end, and the court has no jurisdiction to proceed further. In such case want of jurisdiction is manifest upon an inspection of the record; and for that reason the original judgment is a nullity, either as a judgment in rem or in personam.

That the rule that in a scire facias to revive a judgment no defense can be availed of which existed anterior to the judgment, is not applicable where want of jurisdiction appearing upon the record is urged against the validity of the judgment; it is immaterial whether such want of jurisdiction be urged in the first or in a subsequent scire facias proceeding.

And the court, in its opinion, said:

"In the application of the established rule that the verity of the record and the validity of the judgment of a superior court of general jurisdiction cannot be collaterally impeached, a distinction has been observed between the want of jurisdiction and the irregularity or erroneous exercise thereof. Where it appears by the record itself, that the judgment of such a court has been rendered without jurisdiction either of the subject matter or of the person of the defendant, or in actions purely or quasi in rem of his property, such judgment and the proceedings for its enforcement, may, in collateral proceedings, be disregarded and treated as a nullity (citing and quoting from Galpin vs. Page, 18 Wall. 350; Voorhees vs. Bank., 10 Pet. 475; Pennoyer vs. Neff, 95 U. S. 714).

And again:

"But, however courts may have differed as to whether the record may be collaterally attacked when its asserts or is silent as to jurisdictional facts, it is now established, by the overwhelming weight of authoritive adjucations, that the record of a domestic court of record of general jurisdiction may be impeached and be regarded as a nullity in a collateral proceeding, if want of jurisdiction of the subject matter or of the parties, or of the res, in an action in rem, is manifest from an inspection of the record. To hold a judgment binding when the record disclosed a want of authority over the defendant would be to impeach, rather than sustain, the absolute verity of the record (citing cases).

"Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction apparent upon the record, it is, in legal effect, no judgment. In legal contemplation it has never had lawful existence. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. All acts performed under it, and all claims flowing out of it, are void. It cannot be the basis of an execution or the foundation of a valid title to property purchased at a sale thereunder. No action on the part of the plaintiff, no action of the defendant, can invest it with any of the elements of power or vitality. It is unavailing for any purpose. It can be taken advantage of at any time, and in any court where it is offered as a conclusive adjudication between the parties; for an inspection shows that it is not such because the court had no power, for manifest want of jurisdiction, to make an adjudication. Such a judgment, when collaterally drawn in question, may be disregarded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal (citing cases). This doctrine has been recognized repeatedly in actions of trespass, ejectment, debt on judgments, and other collateral proceedings, wherein such judgments have been drawn in question."

And again:

"The default of the defendant to plead to the scire facias, and show the want of jurisdiction apparent of re-

cord against the original judgment, cannot be held to be such an admission to the contrary, or such a waiver, as will cure that fatal infirmity in the judgment at the time of its rendition, for the character and status of said judgment were fixed at that time. If void then, it could have no existence or force thereafter. As was said by the court in Pennoyer vs. Neff, 95 U. S. 714: 'The judgment, if void when rendered, will always remain void * * * * The validity of every judgment depends upon the jurisdiction of the court before it is rendered; not upon what may occur subsequently.' "

In Smith vs. Broderick, 107 Cal. 644, it was held that where a levy and assessment for payment of a claim against the city is invalid, one for payment of a judgment on such claim is also invalid.

The cases cited by the defendant in error are none of them in point, excepting the discredited and overruled case of Webster vs. Reid, 1 Morris (Ia.) 87.

In U. S. vs. Knox Co., 122 U. S. 306, cited by defendant in error (Brief p. 23), it was held that in a proceeding by mandamus to compel the levy by a county court of a tax sufficient to pay a judgment obtained against the county, the return of the respondents to the alternative writ of mandamus which admitted that the judgment of the relator was recovered upon bonds and coupons issued by the county, but alleged that said soupons were not issued in pursuance of law, making them the valid obligation of the county, the return was insufficient in law as the respond-

ents were estopped to deny the validity of the bonds by the judgment in favor of the relator against the county, and that said judgment was none the less conclusive because rendered by default.

The claimed defect in the bonds was that they were issued only by authority of Sec. 13, of the special charter of the railroad, and not under the general law. The bill in equity alleged that they were issued under the general law of the state. The court held that the bonds would have been valid if issued under Sec. 13 of the special charter of the railroad, and that as the bill in equity alleged that they were issued under the general law, and such allegation was a traversible one, the question was concluded by the judgment.

In Northern Pacific Ry. Co. vs. Ellis, 144 U. S. 458, cited by defendant in error (Brief p. 24), in an action in a Wisconsin court to quiet the title to land, the complaint alleged that defendant claimed under a deed from a county, given as an inducement for the location of defendant's railroad. The state supreme court, affirming an order overruling a demurrer to the complaint, decided that a donation of land by a county to a railroad company was void and could not be validated by the legislature, and therefore the deed to defendant was void. The cause being remanded, the trial court refused to receive in evidence the record of a suit in the United States Circuit Court, commenced subsequently to the one in the state court, by the defendant against plaintiff and others, in which a decree was rendered,

subsequent to the decision of the state Supreme Court, holding the title of the railroad company good. The state Supreme Court held this proper, on the ground that its decision on the demurrer as to the title was res adjudicata. Held, that a writ of error to the state Supreme Court would be dismissed, the judgment resting on a ground not involving a federal question and not denying to the decree of the United States Circuit Court the effect which, under similar circumstances, would be given a judgment of the state court.

In Board vs. Shutter, 139 Ind. 268, cited by defendant in error (Brief p. 23), the controversy was over a proceeding had in a circuit court of Indiana brought by the board of Children's guardians for the appointment of a guardian for an infant. In the proceeding notice was given to the parents, but not to the infant, but the infant was brought into court and was present at the hearing. The court held that the court had the custody of the infant, and as he was present at the hearing, it had jurisdiction of the proceeding, and its order and judgment could not be collaterally attacked.

In Cassell vs. Scott, 17 Ind. 514, the action was brought to restrain the collection of a judgment rendered upon certain bonds, filed with the auditor under the provisions of an unconstitutional law, and it was held that the judgment rendered thereon, although erroneous, was not void, as the judgment "was founded upon the bonds and

not on the act, and of the suit upon them, the circuit court had full jurisdiction" (p. 515 of opinion).

The judgment was not dependent for its validity entirely on the unconstitutional law.

The law of Indiana is clearly shown by the case of Smith vs. Myers, 109 Ind. 1, 9, where the court said:

"It is a rudimentary principle, acted upon again and again, that when it is ascertained that there is no jurisdiction, courts will go no further. It would not only be a vain and fruitless thing to assume to decide a question when there is no jurisdiction, but it would be a mischievous thing, because it would give an appearance of authority to that which is utterly destitute of force. Such a decision would be the merest shadow of authority, binding nobody, (People vs. Walter, 68 N. Y. 403, 411; Weeden vs. Town Council, 9 R. I. 128). It is laid up among the earliest principles of law, that a decision where there is no jurisdiction is absolutely and incurably void."

If we are right in our other contentions, and the Atchison County District Court had no jurisdiction to order the attached property of a dead man sold to pay a simple contract debt of the decedent, then there is no question whatever, under the authorities, that the order and judgment of the court is absolutely void, and creates no estoppel.

Although a court may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the laws of its organization, such decree is void and is not res adjudicata.

Bigelow vs. Forest, 9 Wall. 339.

Windsor vs. McVeigh, 93 U. S. 274.

U. S. vs. Walker, 109 U. S. 258.

Ex parte Neilson, 131 U. S. 176.

In the case last cited it was held that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or for any other reason, the judgment is void and may be questioned collaterally; and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas corpus.

In Folger vs. Ins. Co., 99 Mass. 267, it was held that the dissolution of a corporation at the suit of an individual in the Supreme Court of New York was in excess of the authority of the court, and would be treated as void by the Supreme Judicial Court of Massachusetts.

In Griffith vs. Frazier, 8 Cranch 9, the plaintiff in error, who was also plaintiff in the circuit court, brought an action of trespass to try title to certain lands in South Carolina. His title was derived as follows:

Joseph Salvadore, who was seized of the lands in dispute, died in 1786, and in his last will and testament named several executors, one of whom, Joseph Dacosta, made probate of the will, and was made executor. In 1789, Dacosta left the State of South Carolina and resided in Georgia. In 1790 letters of administration on the goods of Salvadore, unadministered by Dacosta, his qualified executor, were granted to James Lamotte. In August, 1786,

Daniel Bordeaux obtained a judgment against Salvadore. In January, 1791, a thirty-day rule, which by an act of the State of South Carolina was, in certain cases, substituted in the place of a scire facias, was issued to revive that judgment against Lamotte as administrator of Salvadore, and on March 15, 1791, the court entered an order making the rule absolute, and on April 16, 1791, a fieri facias was issued. The land was sold under an execution issued on such judgment, and was conveyed by the sheriff to Peter Freneau by a deed dated June 6, 1791. On July 16, 1796, a decree was rendered in the suit of Pierce Butler vs. Daniel Bordeaux and Peter Freneau, directing the said Peter to convey to such person as Pierce Butler should appoint, and in consequence thereof Peter Freneau conveyed to Samuel Jackson, under whom the plaintiff claimed by mesne conveyances.

The court held, in an opinion delivered by Chief Justice Marshall, that so long as a qualified executor was capable of exercising the authority with which he had been invested by the testator, that authority could not be enforced, either with or without limitation, by the court of ordinary, or any other person, and if, during such capability of the executor, the ordinary grant administration, either absolute or temporary, to another person, that grant was absolutely void. That the court of ordinary would be without jurisdiction, and its act would be void, and to give jurisdiction to the ordinary, a case in which, by law, letters of administration may issue, must be brought before him. That the fact that

the judgment against Salvadore was revived by the circuit court against Lamotte, the administrator, did not make the matter res adjudicata. (See especially the concluding words of the opinion.)

And in the opinion Chief Justice Marshall said:

"If, under any circumstances, the ordinary could grant administration during the absence of an executor who has made probate of the will and is legally competent to act, then he would have jurisdiction of the subject, and would judge of those circumstances; but if, in no possible state of things, he could grant such administration, it would be difficult to conceive how he can have jurisdiction.

"If we refer to authority, we can find no case and no dictum which admits the jurisdiction of the ordinary, where there is an existing executor capable of acting. In many cases it is stated that an administration granted, where there is such an executor, is void. Toller, in his Law of Executors, page 120, says, 'if there be an executor, and administration be granted before probate and refusal, it shall be void on the will being afterwards proved, although the will were suppressed or its existence were unknown, or it were dubious who was executor, or he was concealed or abroad at the time of granting the administration.' It is also said that 'if granted because the executor has become a bankrupt, or if granted, durante minoritate, when the infant had attained his age of seventeen, until the statute of 38 Geo. III. So, if granted by a bishop where an intestate

had bona notabilia, or by an archbishop of effects in another province.' "

"A judgment pronounced by a tribunal having no authority to determine the matter is necessarily and incurably void and may be shown to be so in any collateral or other proceeding in which it is drawn in question."

1 Freem. Judgm., Sec. 120.

Brown Juris., Sec. 1.

"A void judgment is, in legal effect, no judgment. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers. The purchaser at a sale by virtue of its authority finds himself without title and without redress."

Freem. Judgm., Secs. 117, 120.

In Thaxton vs. Smith, 38 S. W. Rep. (7 Tex.), 820, 827, it was held that where a grantor in a trust deed for creditors dies before the trust is executed, and there is a condition of affairs authorizing the appointment of an administrator, the authority of the trustee is terminated, and the district court has no jurisdiction to authorize the trustee to enforce the trust, though no administration is pending, and all the property belonging to the estate is embodied in the trust deed.

And further that the question of jurisdiction was not affected by a prior adjudication in favor of the authority of

the trustee to act under the deed, in an action between the same parties, after the grantor's death, such adjudication being void.

And in that case the court said:

"If it be conceded that the question heretofore ruled upon was involved in that case, the attempted exercise of jurisdiction by that court over the estate of Crosby after his death, would stand upon no firmer basis than would a judgment in plaintiff's behalf in the case before us. In either instance the court was wanting in jurisdiction to empower a trustee without an interest to proceed to dispose of the estate of a decedent."

In Scott vs. McNeal, 5 Wash. 309, an administrator was appointed for the estate of one Moses H. Scott, on the ground that he had "mysteriously disappeared sometime during the month of March, 1881, and more than seven years ago," Scott was in fact alive. The Supreme Court of Washington held that the probate court acquired jurisdiction, and a sale of the lands of the decedent by the administrator could not be collaterally attacked by Scott, in an action of ejectment brought by him to recover the lands where the title had passed to innocent purchasers who had taken possession and made valuable improvements, (following Rodrigas vs. Institution, 63 N. Y. 460). That case was reversed by this court, Scott vs. McNeal, 154 U. S. 34.

The opinion of the court was delivered by Chief Justice Fuller, and Griffith vs. Frazier, 8 Cranch 9; Rose vs.

Himely, 4 Cranch 241, and Thompson vs. Whitman, 18 Wall. 457, were cited and followed.

The reason for the opinion was that the probate court had no jurisdiction, as its jurisdiction was only to grant administration for the estate of dead persons, and it had no jurisdiction whatever over the estate of a live person, and its pretended letters of administration were absolutely void.

In Wise vs. Williams, 3 Cranch 331, it was held that a justice of the peace in the District of Columbia was an officer of the government of the United States, and was exempt from military duty, and that the sentence of a court-martial, imposing on him a fine, was no justification in an action of trespass brought against the collector of militia fines.

While it is true that the personal appearance of the plaintiff in error and his filing an answer in the suit against him would ordinarily give a court jurisdiction over his person, yet this general rule is not applicable to a case like the present where jurisdiction is obtained over a defendant by the attachment of his property. In such a case if the attachment fails, the court loses jurisdiction over the person of the defendant.

Central R. Co. vs. Georgia Co., 32 S. C. 319.
Frankel vs. Satterfield, 9 Houst. 201.
Brenner vs. Egly, 23 Ks. 123.
Neal vs. Reynolds, 38 Ks. 432.
Kellogg vs. Hazlett, 2 Ks. App. 525.

SEVENTH: THE ORDER AND JUDGMENT OF THE DISTRICT COURT OF ATCHISON COUNty, KANSAS, OF DECEMBER 13, 1897, DIRECTING THE SALE OF THE ATTACHED PROPERTY, WAS NOT RES JUDICATA, AND SHOULD HAVE BEEN SET ASIDE ON MOTION OF THE PLAINTIFF IN ERROR.

The order and judgment of the Atchison County District Court, that the attached property be sold, is not, under the Kansas practice and decisions, res judicata, as to whether such property was exempt from judicial process, and being so exempt, the motion of the plaintiff in error to set aside that part of the judgment, and the motion to withdraw the execution should have been sustained. Even if such attached property had been sold, and the sale confirmed by the court, the order of the court confirming such sale would not be res judicata.

Koehler vs. Ball, 2 Ks. 161, syl. 6.

White Crow vs. White Wing, 3 Ks. 270, 280.

Benz vs. Hines, 3 Ks. 390, 397.

Treptow vs. Buse, 10 Ks. 170, 180.

Harrison vs. Andrews, 18 Ks. 535, 539.

Watson vs. Jackson, 24 Ks. 442, 443.

Bank vs. Huntoon, 35 Ks. 577, 587.

De Jarnette vs. Verner, 40 Ks. 244, syl. 5.

Havens vs. Pope, 62 Pac. 538; S. C. 10 Ks. App.

In Rullman vs. Hulse, 33 Ks. 671, it was decided that an attachment could only be issued and levied upon "such

property of his (the defendant), as it not exempt from judicial process." That the attachment might be "vacated or discharged upon motion by any person interested in its discharge." The statute authorizing the discharge of attachments does not create any limitation upon the reasons or grounds for the discharge of attachments, or intimate that there is any such limitation. That the attachment ought to be discharged if it appears that "the property attached does not belong to the defendant, or is exempt from judicial process," and (p. 672) that "it has also been held that in a motion to discharge an attachment against a non-resident the defendant may, for the purpose of discharging the attachment, show that the action did not wholly arise within the limits of Kansas as is required in such cases by statute (Stone vs. Boone, 24 Ks. 337)."

For the reasons given we think that the judgment of the Kansas Supreme Court should be reversed, with directions to sustain the motions filed by the plaintiff in error to set aside the judgment of the Atchison County District Court of December 13, 1897, and the order of the court directing the sale of the property attached in said action, and to withdraw the execution issued on said judgment, and for such other orders and relief as the plaintiff in error may be entitled to.

L. F. BIRD,
Attorney for Plaintiff in Error.

C. F. HUTCHINGS,
Of Counsel.

No. 120.

FILED
NOV 14 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Jackson & Jackson for D.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Filed Nov. 14, 1902.

REUBEN M. MANLEY, Executor of the Estate of GEORGE MANLEY, deceased,
Plaintiff in Error;

vs.

ANNA O. PARK, successor in interest and substituted for RICHARD A. PARK, deceased,
Defendant in Error.

No. 120.

MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM, AND STATEMENT OF CASE, BRIEF AND ARGUMENT OF DEFENDANT IN ERROR THEREON.

JACKSON & JACKSON,
Attorneys for Defendant in Error.

THE HOME PRINTING CO., ATCHISON, KANSAS.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

REUBEN M. MANLEY, Executor of the Estate of GEORGE MANLEY, deceased, *Plaintiff in Error*: vs. ANNA O. PARK, successor in interest and substituted for RICHARD A. PARK, deceased, *Defendant in Error.*	No. 120.

MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM, AND STATEMENT OF CASE, BRIEF AND ARGUMENT OF DEFENDANT IN ERROR THEREON.

Preliminary to such motion the motion of Anna O. Park to be substituted as defendant in error is submitted.

Since the record was filed in this court, Anna O. Park, as successor in interest of Richard A. Park, deceased, by transfer of the interest of the original plaintiff during the pending of the suit, has filed suggestion of his death and motion to be substituted as defendant in error, un-

der the following provisions of the statutes of Kansas, to-wit:

"Ch. 80, Sec. 40. An action does not abate by the death or other disability of a party, or by the transfer of any interest therein, during its pendency, if the cause of action survive or continue. In case of the death or other disability of the party, the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action," and the decision in Warner v. Hatton, 54 Kan., 250.

The statutory liability of stockholders in Kansas is contractural.

Elevator Co. v. Whitbeck, 63 Kan., 102;

Woodworth v. Bolls, 61 Kan, 569; 582;

Whitman v. National Bk. of Oxford, 176 U. S., 559,

and an action upon such liability survives at common law and under G. S. Kansas, 1901, par. 4869.

Richmond v. Irons, 121 U. S., 27.

Such suggestion and motion of such assignee and successor in interest will therefore be sustained, and she will be substituted as defendant in error.

On August 26, 1902, there was filed the following motion to dismiss or affirm:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

REUBEN M. MANLEY, Executor of the Estate of GEORGE MANLEY, deceased, *Plaintiff in Error*; vs. ANNA O. PARK, successor in interest and substituted for RICHARD A. PARK, deceased, *Defendant in Error.*	No. 120.

MOTION TO DISMISS OR AFFIRM.

Comes now the defendant in error, Anna O. Park, successor in interest of and substituted for Richard A. Park, by Horace M. Jackson, her counsel, appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment, from which the said writ of error purports to have been taken, is the judgment of the Supreme Court

of one of the United States, to wit: The Supreme Court of the State of Kansas; and because, from the statement of this case made by the Supreme Court of Kansas in its opinion, and the judgment and decision therein, it is manifest that no Federal question was passed upon by that court, and that its decision and judgment was based upon local statutes involving no Federal question, and which local statute was, of itself, sufficient to support the judgment and decision of the Supreme Court of the State of Kansas, and because the decision of the Supreme Court of the State of Kansas was based solely upon a proposition of law therein involved, to wit: That a former decision in said cause and between said parties was an adjudication of the questions presented and involved, and concluded the plaintiff in error in the case in which the said decision of the Supreme Court of Kansas was rendered, and from which decision petition in error in this cause has been issued to said Supreme Court of the United States.

And the said defendant in error, by counsel as aforesaid, also moves the court to affirm the said judgment from which said writ of error purports to have been taken, because, although the record in said cause may show that this court has jurisdiction in the premises, it is manifest that the said appeal was taken for delay only.

HORACE M. JACKSON,
Counsel for Defendant in Error.

STATEMENT OF CASE.

This action was originally commenced by attachment in the District Court of Atchison County, Kansas, to recover of the non-resident executor of the estate of George Manley, deceased, upon his liability as a stockholder of The Kansas Trust and Banking Company as provided by the constitution of the State of Kansas and legislation thereunder. Record, p. 5.

Pending such action the then executor of said estate resigned and was succeeded by the plaintiff in error, who was duly substituted as defendant therein. Record, p. 21.

Upon answer (record, p. 22) and reply (record, p. 25) trial was had, and, on December 15th, 1897, judgment rendered in favor of defendant in error for the sum of $2463.07, and attached property ordered sold to satisfy the same. Record, p. 29.

Proceedings in error were commenced in the Supreme Court of the State of Kansas to review such judgment and dismissed and mandate of dismissal filed in such District Court December 12th, 1899. Record, p. 34.

No Federal question was presented until after such final judgment of the Supremt Court.

Upon such judgment and mandate, order for sale of the land attached was duly issued from

the District Court and levied, when plaintiff in error filed in that court his motions to set aside said judgment (record, p. 35), and for the withdrawal of said order of sale. Record, p. 37.

The same grounds were stated in both such motions, and then for the first time a Federal question was raised or attempted to be raised by the claim therein that Section 203 of the Executors and Administrators Act of the State of Kansas, under which such action and attachment were prosecuted, violated Sections 1 and 2, Article 4, and the 14th Amendment of the Constitution of the United States and also Section 27 of the Act of Congress creating the Territory of Kansas. Upon the trial of such motions in the District Court the only evidence offered was the record on the original trial and judgment therein. Such motions were overruled solely upon the ground that under the constitution and laws of Kansas the trial court in the original trial had jurisdiction of the parties and subject matter; that the judgment therein was final, and concluded the plaintiff in error against the relief sought by such motions; that he could not reopen the case and, by supplemental motions, make a further defense which he could have made on the original trial or urge any question necessarily involved therein.

From such judgment plaintiff in error again proceeded in the State Supreme Court, which court affirmed the judgment of the District

Court solely upon the ground of *res adjudicata* and estoppel as fully appears from the syllabus, statement and opinion. Record, pp. 42-49.

From such judgment of affirmance petition in error was allowed to this court and it clearly appears therefrom that no Federal question was involved or decided; that the only question presented, considered or decided was that under the general law and statutes of Kansas, the original judgment was a complete bar to relief upon such motions.

POINTS OF LAW.

The attempt to raise the claimed Federal question was made too late.

It was made after the final decision and on supplementary motions presented after the first appeal. Such delay precludes a review by this court.

Scudder v. Coler, 175 U. S., 32-36, and cases cited.

When first raised on petition for rehearing it is too late.

Turner v. Richardson, 180 U. S., 87-92.

Boston B. & L. Asso. v. Welling, 181 U. S., 47.

Meyer v. Richmond, 172 U. S., 82-92.

When raised on second appeal it is too late.

Yazoo M. V. R. Co. v. Adams, 180 U. S., 1-7, and cases cited.

Union Mu. L. Ins. Co. v. Kirchoff, 169 U. S., 103.

No Federal question was decided or necessary to the decision made.

A definite issue as to the validity of the statute must be distinctly deducible from the record before it can be held that a Federal question was disposed of by the decision.

Powell v. Supervisors of Brunswick Co., 150 U. S., 433.

Such case is directly in point. In that, as in this, plaintiff in error, as defendant, nowhere claimed in the original action any privilege or immunity under the Constitution of the United States, nor suggested any Federal question, but in a supplemental proceeding by brief, as in this case by motions, it was urged that the Act giving the District Court jurisdiction was in conflict with the Constitution of the United States, and the State Court only decided that the District Court had jurisdiction of the original case, and had jurisdiction to decide incorrectly as well as correctly, and that such decision was a final and conclusive determination of the rights of the parties which could not be questioned except by appeal within the time and in the manner provided by law.

To authorize the review of a state judgment it must appear that the decision of a Federal question was necessary to the determination of the case and was actually decided.

Kans. End. & Ben. Assn. v. Kansas, 120 U. S., 103.

Church v. Kelsey, 121 U. S., 282.

Clark v. Pa., 128 U. S., 395.

N. O. Waterworks Co. v. La. Sugar Refining Co., 125 U. S., 18.

To give this court jurisdictian of a writ of error it must appear affirmatively not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, or was decided, or that the judgment as rendered could not have been rendered without deciding it.

Eustice v. Bolles, 150 U. S., 361.

Cook v. Chicago & C. Canal & Dock Co., 138 U. S., 635.

Klinger v. State of Missouri, 80 U. S., 257-263.

Jenkins v. Lowenthal, *et al.*, 110 U. S., 222.

Egan v. Hart, 165 U. S., 188.

Rafael M. Del Costillo v. McConnico, 168 U. S., 674-679.

The decision was clearly upon grounds other than a Federal question and this court has no jurisdiction.

Even though a Federal question was presented and decided this court will not entertain jurisdiction of state judgment if besides the Federal question decided by the State Court, there is another and distinct ground on which the judgment can be sustained.

The Kennebeck & Portland Rld. Co., v. The Portland & Kennebeck Rld. Co., 81 U. S., 23.

Rector v. Ashley, 73 U. S., 142.

Gibson v. Christian, 75 U. S., 314.

Johnson v. Risk, 137 U. S., 300.

Hopkins v. McLure, 133 U. S., 380.

Hale v. Akers, 132 U. S., 554.

Hale v. Lewis, 181 U. S., 473.

N. Y. C. & H. R. Rld. Co. v. City of New York, No. 234, October Term, 1901—Advance Sheets, Lawyers' Ed., p. 916.

When the State Court has rendered its decision on a local or state question or a general law, the logical course for this court is to dismiss the writ of error.

St. L. G. & F. S. Ry. Co. vs. The State of Missouri, 156 U. S., 478.

A decision of a State Court based on estoppel involves no Federal question.

Weyerhausser v. State of Minnesota, 176 U. S., 550-559.

Nor when based on laches.

Pittsburg & Lake Angeline Iron Co. v. Cleveland Iron Mining Co., 178 U. S., 270-280.

Mran v. Horsky, 178 U. S., 205-215.

The decision of the State Court having been upon the state statute and general law, and being sustained thereby, this court will not review the decision, even though there was an attempt to raise a Federal question.

Eustice v. Bolles, 150 U. S., 361, *supra*.

De Saussure v. Gaillard, 127 U. S., 210.

No Federal question having been raised in the original case; the appeal therefrom having been dismissed; the attempt to raise the Federal question having been first made after the first appeal and by collateral motions; the judgment of the State Court having been upon a state statute and general law to support which, the decision of the Federal question was wholly unnecessary, it follows that the claimed Federal question was not raised in time, was not decided by the State Court, is not involved in the case and that this court is without jurisdiction and the cause should be dismissed and we respectfully ask that it be so ordered.

POINTS UPON THE MERITS.

Upon the merits of the case, we suggest the following as the errors suggested and the points and authorities therein and refer to the quite full statement of the case heretofore made, and which was so made for the purpose of avoiding a repetition in submitting the merits.

The assignment of errors made is a mixed statement of facts and of law.

Separating the statement of facts from the propositions of law the errors assigned are as follows:

1. That the District Court of Atchison County, Kansas, had no jurisdiction to entertain the suit or render judgment therein.

2. That said court had no jurisdiction to order the sale of the property attached to satisfy the judgment.

3. That said action was a suit against the executors of an estate and, under the constitution and the laws of the State of Kansas, the Probate Court of Atchison County, Kansas, and not the District Court of said county, had jurisdiction to entertain the claim of the plaintiff.

4. That no attachment could legally issue against the property of the defendant executor.

5. That the original judgment was void, because the District Court thereby ordered the sale of the property of a dead man.

6. That the said District Court in rendering said judgment and ordering sale of attached property, did not give full faith and credit to the public acts and judicial proceedings of the Surrogate of the Orphans Court of Union County, New Jersey, where the estate of George Manley, deceased, was being administered, in violation and disregard of Section 1, Art. 4 of the Constitution of the United States.

7. That said court did not accord to the defendant, a citizen of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas, as guaranteed by Sec. 2, Art. 4 of the Constitution of the United States.

8. That said District Court by said judgment abridged the privileges of the defendant and deprived him of his property without due process of law in violation of the 14th Amendment of the Constitution of the United States.

9. That the Supreme Court of the State of Kansas erred in affirming the said decision and judgment of the District Court of Atchison County.

10. That said Supreme Court of the State of Kansas erred in that by its judgment and decision it adjudged and determined that the original judgment of said District Court, rendered on December 15, 1897, concluded the plaintiff in error herein.

11. That said Supreme Court erred as stated in the last assignment of error, because said judgment was void on its face for the reasons stated in the previous assignments of error herein designated.

While the specifications of error made by plaintiff in error are not in terms or numbered as above stated, nevertheless, we have carefully analyzed and succinctly stated the points and legal propositions made and claimed in such assignment of errors.

Of the errors so generally assigned, the first four depend entirely upon the construction of the constitution and laws of the State of Kansas and may be considered together. They rest upon the claimed want of jurisdiction of the District Court as fixed by the constitution and statutes of the state.

The action was to recover from the defendant below, plaintiff in error, and was upon a contract.

The liability of a stockholder is contractural.

Woodworth v. Bowles, 61 Kan., 569, *supra*.

Elevator Co. v. Whitbeck, 63 Kan. 102, *supra*.

Evans v. Nevis, (C. C. New York) 101 Fed. 920.

Richmond v. Irons, 121 U. S. 27, *supra*.

Whitman v. Nat'l Bank, 176 U. S., 559.

Hathorn v. Calef, 69 U. S., 10.

The District Court had jurisdiction.

The constitution and statute of Kansas provides:

Constitution, Art. 3, Sec. 6. "The district court shall have such jurisdiction in their respective districts as may be provided by law," and the statute (G. S. 1901) provides:

Sec. 1923. "There shall be in each county organized for judicial purposes, a district court, which shall be a court of record, and shall have general jurisdiction of all matters, both civil and criminal (not otherwise provided by law), and jurisdiction in cases of appeal."

Sec. 3009. "An executor or administrator duly appointed in any other state or country may sue or be sued in any court in this state, in the capacity as executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued."

And in the code of civil procedure:

Sec. 4624. "The plaintiff in a civil action for a recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated:

First, when the defendant or one of several defendants, is a foreign corporation, or a non-resident of this state."

The claim that the Probate Court had jurisdiction of this case is not sustained as appears from the jurisdiction so given to the District Court and the following provisions of the constitution and statute of that state.

Constitution. Art. 3. Sec. 8. "There shall be a Probate Court in each county, which shall be a court of record, and have such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound minds, as may be prescribed by law."

And the statute, so far as relates to this case, is as follows:

Sec. 1974. "The Probate Courts shall be courts of record, and, within their respective counties, shall have jurisdiction; first, to take the proof of last wills and testaments, and admit them to probate, and to admit to record authenticated copies of last wills and testaments executed, proved and admitted to pro-

bate in the courts of any other state, territory or county.

Second, to grant and revoke letters testamentary and of administration.

Third, to direct and control the official acts of executors and administrators, settle their accounts, and order the distribution of estates;

. . . . . .

Seventh, *to have and exercise the jurisdiction and authority provided by law respecting executors and administrators, and the settlement of the estates of deceased persons.*"

"Sec. 2833. Letters testamentary and of administration shall *in no case be granted to a non-resident of this state;* and when an executor or administrator shall become a non-resident, the Probate Court having jurisdiction of the estate of the testator or intestate of such executor or administrator, shall revoke his letters."

By such provisions of the constitution and statutes, jurisdiction of suits *by and against non-resident executors and administrators* is expressly given to the District Courts, while jurisdiction respecting resident executors and administrators appointed by Probate Courts is given to the Probate Court, but the Probate Court is denied jurisdiction over non-resident executors and administrators and such jurisdiction is, by said Sec. 3009, expressly given to the District Courts.

The Probate Court did not have jurisdiction.

Ewing v. Mallison, Sup. Ct., Kan., Oct. 11, 1902. 70 Pac ——.

If the District Court had jurisdiction of actions of the same general nature, that is, of actions to recover upon a contractural liability and against non-residents having property within the jurisdiction of the court which could be attached, then such court had jurisdiction of this case.

Jurisdiction of cases of a general class gives jurisdiction of the subject matter of a case which belongs to such class.

Cooley on Const. Lim. (2 Ed.) 398.

Wells on Jurisdiction. Secs. 3, 4.

Brown on Jurisdiction. Sec. 1A.

United States v. Arredondo, *et al.*, 6 Peter 691, at 709, where it is said "The power to hear and determine a cause is jurisdiction."

Florentine v. Barton, 69 U. S., at 216.

Cooper v. Reynolds, 77 U. S., 308-316.

12 Enc. P. & P., 121, Note 1 and citations.

Hallock v. Downing, 69 N. Y., at 240.

Hunt v. Hunt, 72 N. Y., 229.

Fithian v. Monks, 43 Mo., 502.

See also decision of the Supreme Court in this case. 62 Kan., 559.

The judgment on the original trial concluded the defendant below, plaintiff in error, in the state court and in this court.

The judgment in the original case was affirmed by the dismissal of the first appeal and such decision became the law of the case for all purposes and was not open for re-consideration.

Headley v. Challiss, 15 Kan., 602.

Rld. Co. v. Shoup, 28 Kan., 394.

Crockett v. Gray, 31 Kan., 346.

Norton v. Huntoon, 43 Kan., 275.

Florentine v. Barton, 69 U. S., 210, *supra*.

United States v. Camou, decided by this court at last term and reported Advance Sheets, Lawyers' Ed., 1902, pp. 505-6.

Illinois *ex rel* Hunt, v. Ill. Cent. Rld. Co., decided by this court at the last term reported Lawyers' Ed. advanced sheet, p. 300.

Board of Children's Guardians v. Shutter, 139 Ind., 263.

The District Court construed the Constitution and sustained the statute and this court considers itself bound by the construction and validity of the state, constitution and statute, when given by courts of last resort of the state.

Burgess v. Seligman, 107 U. S., 20.—6th syll.

Florentine v. Barton, (Opinion) 69 U. S., 210, at 216, *supra.*

South Ottawa v. Ottawa, 94 U. S., 260-268.

Atlantic & G. Rld. Co. v. Georgia, 98 U. S., 359.

Dunkin v. McCall, sheriff, 139 U. S., 449.

Post v. Kendall Co., Supervisors, 105 U. S., 667.

Clark v. Clark, 178 U. S., 186.

Abraham v. Casey, 179 U. S., 210.

Such statute giving the District Court jurisdiction in suits against non-resident executors and administrators, by attachment and otherwise, was enacted in 1868 and is sustained by a long line of decisions as follows:

Cady v. Bard et al, exrs. 21 Kan. 667.

Opinion by Mr. Justice Brewer, who said "Now a non-resident may be sued in an action on a contract for the recovery of money, and service may be obtained by attachment and publication. 'In like manner', may a foreign executor or administrator be sued. That a state has jurisdiction over all property within its limits and may subject it to the process of its courts, will not be doubted. * * * * * * * It is enough for the purpose of this case to hold that jurisdiction may be acquired so far as may be necessary to cut off all interest of the non-resident defendant in the property attached."

Denny v. Faulkner, 22 Kan., 89 at 96.

Ravenscraft v. Pratt, 22 Kan., 20, at 25.

Dunlap v. McFarland, Admr, 25 Kan., 488.

Donifelser v. Heyl, 7 App. 606, affirmed in Heyl v. Donifelser, 59 Kan., 779.

Eells, admr. v. Holden, 2 McCrary 622 in which McCrary, circuit judge, said: "Under Sec. 2491 (Sec. 3009 above quoted) compiled laws of Kansas, an executor or administrator appointed in another state may sue in Kansas in like manner and under like restrictions as a non-resident may sue. The decisions of the Supreme

Court of the state construing and applying its attachment laws control."

The defendant below (plaintiff in error) personally appeared and the District Court thereby acquired jurisdiction of the person of defendant.

Frazier v. Douglas, 57 Kan., 809.

Packing Co. v. Casing Co., 34 Kan., 340.

Burdette v. Corgan, 26 Kan., 102.

Kaw Life Assoc. v. Lemke, 40 Kan., 142.

Burnham v. Lewis, Oct. 11, 1902. 70 Pac.—

It has not been contended by plaintiff in error that such District Courts did not have jurisdiction in cases of the same general nature by attachment against non-residents other than non-resident executors and administrators, but it is claimed that as to them such Sec. 203 is in conflict with the Constitution of the United States and therefore void, and for that reason the District Court was without jurisdiction of the cause.

The validity of such law was necessarily involved in the original trial of the case, was then decided by the court, and its judgment a complete adjudication.

Florentine v. Barton, 69 U. S., 210, *supra*.

Board, etc., v. Shutler, 139 Ind., 263, *supra*.

The court having had jurisdiction of the person and of the subject matter, the original judgment rendered thereby was final and conclusive even though the statute upon which such judgment was rendered was afterwards adjudged to be unconstitutional.

Marbury v. Madison, 1 Cranch, 177.

Webster v. Reid, 1 Morris (Ia.), at 632.

(Plaintiff in error has claimed that this rule was reversed by this court in Reid v. Webster, 11 How., 437. This *rule* was not reversed, but this court held that the trial court did not have jurisdiction of the person of the defendant and the case was reversed for that reason.)

Wells Jurisdiction of Court. Sec. 6.

United States v. Knox Co., 122 U. S., 306.

The unconstitutionality of the statute could not be considered on a second appeal.

Northern Pac. Co. v. Ellis, 144 U. S., 458.

In U. S. v. Throckmorton, 98 U. S., 61

the court said: "If the court has been mistaken in the law there is a remedy by writ of error."

In Ellis v. Northern Pac. Ry. Co., 45 N. W., 811.

Same case 50 N. W., 397.

Same case 144 U. S., 458, *supra*,

the Wisconsin Court had rendered a judgment upon and sustained a law which was afterwards held to be unconstitutional and such latter decision was urged against the validity of the first judgment but in the latter case it was held the first judgment was conclusive notwithstanding the law under which it was rendered was void.

In Florentine v. Barton, 69 U. S., 210, *supra*, The validity of an Illinois statute and a judgment based thereon was involved and it was held that "whether the decision was correct or otherwise, its judgment, until reversed, is binding on every other court."

In Barrell v. Tilton, 119 U. S., 637, it was urged that the prior judgment therein attacked was void as having been rendered under an unconstitutional law of Oregon, but the court

said: "The objection, however, is entirely disposed of by the decree of the state court."

In Board of Children's Guardians, etc. vs. Shutter, 139 Ind., 368, *supra*, the court said: "A judgment founded on a statutory bond depending for its validity wholly on the statute which is unconstitutional and void, is not void and cannot be impeached because the statute is unconstitutional and void," and thereon declined to discuss the constitutionality of such statute.

In Arnold v. Dunn, 5 Dana, 18, the action was upon a Kentucky statute clearly in conflict with the Federal constitution, judgment rendered supporting the statute, which judgment was subsequently attacked, and therein the court, as to cases cited and relied upon and in accord of the contention of defendant in error herein, said: "The principle of those cases is applicable to this, and, when applied, leads to the conclusion that the magistrate having jurisdiction over the subject matter and the man had a right to decide whether the penalties sued for were legally recoverable, or, in other words, whether the statute under which it was claimed was valid or void; and if the statute be unconstitutional, that fact does not show that the magistrate had no jurisdiction over the suit, but would prove only that his judgment was erroneous."

In Howard v. Huron, 26 L. R. A. 493 at

499, the validity of the original judgment was attacked because it was confessedly upon a claim void as in conflict with the constitution, and it was held that notwithstanding such admission the judgment was valid, no appeal having been taken therefrom. It was conceded in such case that had the constitutional limitation of the indebtedness been applied in the original trial, it would have prevented the judgment which was then being assailed.

In Cooper v. Reynolds, 77 U. S., 308, it is said that errors are of no avail "unless they be such as to prove that the court had no jurisdiction."

In Chicago & Alton Rld. Co. v. Wiggins Ferry Co., 108 U. S. 18, it was held that a state judgment could not be impeached collaterally in the courts of the United States by showing that if due effect had been given to the laws it would have been the other way.

The dismissal of the original case by the Supreme Court did not change the rule as to the effect of the original judgment.

Wells on Res. Adj. Sec. 9.

The claim of error based upon the order of sale of the property of a dead man is not sustained by the record.

The property attached had been owned by George Manley, afterwards deceased, but at the time of the attachment the title thereto was held by and in the name of the executor of deceased and it was the property and interest of the executor not the deceased which was ordered sold.

The judgment of the court is conclusive as to the validity of the order of sale.

Further errors are assigned based upon the claim that the rights of the plaintiff in error, guaranteed by the Constitution of the United States, were denied by the State Court.

As to such claimed errors, we suggest the following propositions and authorities as though the questions had been timely presented to and in fact involved in and decided by the State Court:

There was no failure to give full faith and credit to the judicial proceedings of the Orphans' Court of New Jersey.

The claim that in rendering the original judgment the court failed to give full faith and credit is not sustained by the record. The Orphans' Court had jurisdiction to probate the will, appoint the resident executor and, so far as related to the property of the estate of George Manley within the state of New Jersey, it had jurisdiction.

The District Court fully recognizes such jurisdiction and gave its proceedings full faith and credit by the recognition of the will and of the order appointing the executors, and the suit was prosecuted against such executors so appointed and full recognition was thereby given to the proceedings of each court.

The State of Kansas had jurisdiction over all the property in the charge of such executors which was within the State of Kansas and had the right to subject it to the process of its courts and to fix the rules enforcing its descent, alienation and transfer, and to determine the effect and construction of wills and conveyances. The laws of New Jersey could not affect the transfer of property in Kansas.

Clark v. Clark, 178 U. S., 186-191.

Brine v. Hartford Ins. Co., 96 U. S., 627.

McGoon v. Scales, 76 U. S. 23 at 30, in which Mr. Justice Miller, speaking for the court, said: "There can be no question of the right of the legislature of the State of Wisconsin to pass such laws as will subject property in her territory, held and owned by non-residents, to the payment of the debt of such owners; and the manner of doing this is also entirely within the legislative control, provided it does not violate some of the provisions of the Federal or State Constitution."

Clark v. Graham, 6 Wheat, 577.

United States v. Crosby, 7 Cranch, 115.

If the New Jersey legislature, through the courts of that state, could exercise jurisdiction over and control the disposition of real property within the State of Kansas, equally so could every other state of the Union.

The conflict of the laws as to the transfer of property in different states which would result from the construction urged, proves the absurdity of the proposition claimed by plaintiff in error.

Cooper v. Ives, 62 Kan., 395 at 399.

Carpenter v. Strange, 141 U. S., 87 at 105.

Arndt v. Griggs, 134 U. S., 316.

In Paul v. Virginia, 75 U. S., 168, opinion, it was held that the laws of one state could have no operation in another state except by consent of such other state.

In Smith v. Union Bank, 5 Peters, at 526, it is said: "The obligation of the sovereign to enforce his own laws and protect his own subjects is acknowledged to be paramount."

In Burkhim v. Pinkhusson, (S. C.,) 36 S. E., 908-9;

auxiliary letters of administration were issued in South Carolina and it was claimed that that was a refusal to give full faith and credit to the judicial proceedings in the Florida Court which had granted primary letters, and it was said:

"We are unable to discover from the 'case' anything tending to show that Section 1, Article 4, of the Constitution of the United States, requiring that 'full faith and credit be given in each State, to the public acts, records, and judicial proceedings of every other State' has been violated as claimed in the first exception; for there is nothing in the 'case' which shows that the action of the court in Florida appointing Burkhim administrator there, was repudiated, or even disregarded, either by the probate judge or the circuit judge here. The rule that the judgments and decrees of the court of any State have no extra territorial force is too well settled to require the citation of any authority. While, therefore, the action of the court in Florida may have had the effect of investing Burkhim with all the rights and powers

of an administrator in that State, it certainly had no force or effect in this State."

Green v. VanBuskirk, 72 U. S., 307.

Hervey v. Rhode Island Loc. Works, 93 U. S., 604.

There was no failure to accord the defendant below as a citizen of New Jersey nor as a citizen of the United States any privilege or immunity, under either Article 4, Section 2 or the Fourteenth Amendment of the United States Constitution.

The plaintiff in error was sued *as an executor* and as such prosecutes this writ of error. As executor he could not claim the privilege or immunity which is accorded to or claimed by either a natural person or an executor appointed by the courts of Kansas and acting as such under its laws.

Mr. Justice Miller in his lectures on the Constitution, page 293, says that "citizens" as there used means "those who have the right of marriage, the right to the control of children; natural persons who owe allegiance to the government." Such term does not include corpor-

ations, officers or trustees created or appointed by or under the laws of other states, for if it be conceded that a right, privilege or authority is conferred upon such officer, by the laws of such other state and such rights are accorded to him in and by a sister state, or enforced by this court it has the effect to extend the laws of the state by which he is appointed or acquires authority, beyond the boundaries of such state and into the states where he may assume to act as such officer.

In Paul v. Virginia, 75 U. S., 357, the court said "The term citizen, as there used, (referring to the Constitution), applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."

In Ins. Co. v. Franch, 18 How., U. S., 404, the court said: "This court does not hold that either a voluntary association of persons or an association into a body politic created by law is a citizen of a state within the meaning of the constitution."

Lemon v. People, 20 N. Y., 607, quoted with approval in Paul v. Virginia.

In Blake v. McClung, 172 U. S., at 259, the court held that a corporation is a citizen of the state under whose laws it is organized and that, "for the purpose of suits by or against it in the courts;" that it is a person within that clause of the 14th Amendment which provides "that it shall not be deprived of property without due

process of law," and said: "but it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision, that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'"

Pembina etc. Co. v. Pa., 125 U. S., 181.

Norfolk etc. v. Pa., 136 U. S., 114.

Fire Association v. N. Y., 119 U. S., 110.

Ducat v. Chicago, 77 U. S., 410.

Sully v. American National Bank, 178 U. S., 302.

Desty on the Constitution, 233.

Caldwell v. Armour, (Del.) 43 Atl., 517.

Were the privileges or immunities of the defendant below, plaintiff in error, abridged or the equal protection of the law denied to him within the provision of the Fourteenth Amendment of the United States Constitution?

The claim of such wrong is based solely upon the ground that under the laws of Kansas the property of a non-resident executor or administrator could be attached by suit in the District Court and sold, while that of a resident

executor or administrator could only be sold by proceedings in the Probate Court and not then by attachment.

As stated, an executor is not a citizen within the provisions of the Fourteenth Amendment.

As to a non-resident, jurisdiction could not be obtained by service of process beyond the boundaries of the state.

Howell v. Mangelsdorf, 33 Kan., 194.

It follows that unless the property of non-resident executors could be attached and the *res* brought within the jurisdiction of the court, it could not be appropriated to the payment of debts of the estate in charge of such non-resident executor.

If it be claimed that a local administrator might be appointed and claims presented to the Probate Court, and allowed and classified, including the claims presented in the court which granted domiciliary letters, but the local estate would be exhausted in the payment thereof, and if the allowance and classification so made by the court granting domiciliary letters should be denied or not recognized, and the same classification and priority of payment ordered, it would at once be urged that "full faith and credit had not been given to the judgments" allowing and classifying such claims, with the consequent result, if sustained, that

property within the jurisdiction of one state, and which the courts of such state have the right to order applied in payment of the debts due to local creditors, would be administered and applied under the law of another state in which domiciliary administration had been granted. Such was not the purpose or intended effect of the Fourteenth Amendment.

But such statute of Kansas gives to the non-residents the same right to sue as is given to residents. In such respect no distinction is made.

The only distinction is that such statute permits suits to be brought by attachment in the District Court against non-residents, while suits against resident executors can only be commenced in the Probate Court and not by attachment, and such distinction rests solely upon the fact of non-residence, a distinction, which in the very nature of things, must exist and must be recognized and permitted.

Because of such necessary distinction it has been repeatedly held that a state may, by statute authorizing the prosecution of suits, classify residents in one class and non-residents in another, and provide one proceeding in one case, and different proceeding in the other, and when based upon such classification, does not infringe the Fourteenth Amendment.

In Central L. & T. Co. v. Campbell C. Co., 173 U. S., 84, there was involved the validity of the statute of Oklahoma authorizing suits against non-residents by the attachment of their property without bond, but which required bond to be given in like suits against residents, and the claim was made that such statute was void as in violation of the Fourteenth Amendment in that it abridged the privileges and immunities of the citizens of another state and denied non-residents "the equal protection of the laws", and in support of such claim the same argument was presented as in this case. In answer the court said (p. 97):

"III. The only remaining contention to be considered is the claim that the territorial statute authorizing the issue of an attachment against the property of a non-resident defendant in the case of an alleged fraudulent disposition of property is repugnant to the Fourteenth Amendment to the Constitution of the United States and in conflict with the Civil Rights Act. The law of the territory, it is said, in case of an attachment for the cause stated against a resident of the territory requires the giving of a bond by the plaintiff in attachment as a condition for the issue of the writ, while it has been construed to make no such requirement in the case of an attachment against a non-resident, this it is argued, is a discrimination against a non-resident, does not afford due process of law and denies the equal protection of the laws." * * * * * *

The argument in substance is that when a bond is required as a prerequisite to the issue of an attachment against a resident, an unlaw-

ful discrimination is produced by permitting process of attachment against a non-resident without giving a like bond. But the difference between exacting a bond in the one case and not in the other is nothing like as great as that which arises from allowing process of attachment against a non-resident and not permitting such proceess against a resident in any case. That the distinction between a resident and a non-resident is so broad as to authorize a classification, in accordance with the suggestion just made, is conceded, and, if it were not, is obvious. The reasoning, then, is that, although the difference in the two classes is adequate to support the allowance of the remedy in one case and its absolute denial in the other, yet that the distinction between the two is not wide enough to justify allowing the remedy in both cases, but accompanying it in one instance by a more onerous prerequisite than is exacted in the other."

And thereon the court held that as "the classification depends upon residence and non-residence, and not upon the cause of action, the attempted distinction was without merit," and reversed the decision of the lower court which had been against the constitutionality of such law.

The rule so stated affirms the decision of this court in

Head v. Daniels, 38 Kan., 1, at 9;

Campbell v. Morris, 3 Harr. & McH., 535;

Buffington v. Grosvenor, 46 Kan., at 734.

The transfer of property in Kansas, by testament, death, and appointment of an executor,

all occurring in New Jersey, is not in any legal aspect different from the transfer of like property by assignment, appointment of the assignee and his qualification in New Jersey or in any other state. Either, if occurring in Kansas, would place the property of the testator or assignor beyond the process of attachment. Neither, if occurring in any other state, would place the property beyond the process of a Kansas court having jurisdiction of the subject matter.

In Reynolds v. Adden, 136 U. S., 348 (34 L. Ed. 360), there was involved an attachment in Louisiana of the property of an assignor who had assigned in Massachusetts. Thereon the assignee prosecuted suit in the Federal Court of Louisiana to enjoin such attachment upon the same ground as here urged by plaintiff in error, but which was not sustained, and the court said (p. 362, L. Ed.):

"It is by the laws of Louisiana that the question must be decided. Every state exercises to a greater or less extent, as it deems expedient, the comity of giving effect to insolvent proceedings of other states, except as it may be compelled to give them full effect by the Constitution of the United States. Where the transfer of the debtor's property is the result of a judicial proceeding, as in the present case, there is no provision of the Constitution which requires the courts of another state to carry it into effect; and, as a general rule, no state court will do this to the prejudice of the citizens of its own state."

Nearly if not all the states of the Union provide for suits against non-residents by the attachment of property; and some prohibit suits by non-residents against non-residents, and as said in Robinson v. Ocean Steam Navigation Co., 112 N. Y., 315, (2 L. R. A., at 638),

"A construction of the constitutional limitation which would apply it to such a case as this would strike down a large body of laws which have existed in all the states from the foundation of the government, making some discrimination between residents and non-residents in legal proceedings and other matters."

In such case it was held that while a statute of New York authorized the appointment of a non-resident as an administrator, another statute which prohibited a non-resident from bringing suit in that state and which barred suit by such administrator, was not void as contravening such amendment.

A statute requiring security for costs from non-resident suitors and not requiring it from resident suitors is not void.

Haney v. Marshall, 9 Md., 194.

A statute providing that the limitation shall run in favor of a resident and against a non-resident, but not in favor of a non-resident, is not unconstitutional.

Chemung Canal Bk v. Lowery, 93 U. S., 72.

"Whenever the law operates alike on all

persons and property, similarly situated, equal protection (of the laws) cannot be said to be denied."

Walston v. Nevin, 128 U. S., 578.

Mo. P. R'y Co. v. Mackey, 127 U. S., 205.

"The amendment could never have been intended to prevent a state from arranging and parcelling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that "No state shall deny to any person within its jurisdiction the equal protection of the laws."

Bowman v. Lewis, 101 U. S., 22.

Hayes v. Missouri, 120 U. S., 68.

Plaintiff in error, claiming under the will of a late non-resident testator, while failing to have administration upon the Kansas property of such estate in the State of Kansas, complains that the laws of such state do not protect him while remaining out of that state and refusing to submit himself to the jurisdiction of its courts, which laws, however, give to him as a suitor the same privilege which is given to citizens of Kansas. Such complaint is without reason. The rule is that:

"The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege—and therefore the

authority which confers it may impose conditions upon it."

Magoun v. Ills. Trust & Savgs. Bk., 170 U. S., at 228.

And further (p. 293) commenting on the Fourteenth Amendment the court, after citing and quoting many authorities, said:

"With these for illustration it may be safely said that the rule prescribes no rigid equality and permits to the wisdom and discretion of the state a wide latitude as far as interference by this court is concerned. Nor with the impolicy of the law has it concern. Mr Justice Field said in Mobile County v. Kimball, 102 U. S., 704 (26 L. Ed., 242), that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive state legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy or injustice of state laws is not necessarily an objection to their constitutional validity.' The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. * * * * * * *

"In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion."

The non-resident executor is not denied any right which is given to him. The statute gives the right to the non-resident executor to sue

as well as to be sued "in the same manner and under like restrictions that other non-residents may sue or be sued." It is no objection to the validity of such law that resident executors who are appointed by and act under direction of Probate Courts, cannot be sued in the same manner that non-residents may be sued.

Leeper v. Texas, 139 U. S., 462, 468.

In Iowa Cent. R. Co. v. Iowa, 160 U. S., 389, it is said:

"It is not a right, privilege or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of by another.

Provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, the question of whether it is by a motion or ordinary action in no way renders the proceedings not due process of law."

Lowe v. State, 163 U. S., 81.

A. T. & S. F. Ry. Co. v. Matthews, 174 U. S., 96.

In fact, plaintiff in error cannot complain that he, as such, or the estate in his charge, is discriminated against by such law. The statute which authorizes suit against him as a non-resident gives him like right to sue, and no discrimination is made in that respect. But the claim is made that if a resident administrator should be appointed, the entire estate within

the State of Kansas would be applied *pro rata* in payment of debts of the deceased. But the entire estate, and no more, may also be appropriated by attachment if it is in charge of the non-resident executor. The statute, therefore, does not discriminate against the estate or the beneficiaries thereof, and such discrimination, if any, is against some of the creditors of the estate only, and, as such creditors may cause local administration of such estate, they may not complain that such statute denies to them the equal protection of the laws.

But the non-resident executor cannot be heard to make such objection for such other creditors. It was so held as to the Hull Coal & Coke Co., of Virginia in

Blake v. McClung, 172 U. S., at 259.

Kansas City v. Union Pacific Ry. Co., 176 U. S., 114.

Sully v. Amn. N. Bk., 178 U. S., 289.

Long v. Forest, 23 L. R. A., 33, and note.

The complaint made by plaintiff in error, when analyzed, is, not that he is discriminated against, for as shown, he is not; nor that the estate is discriminated against, for it is not, as it may be appropriated in payment of debts, *pro rata* in case of local administration, or in the order of levy in case of local attachment against a non-resident executor, but the com-

plaint is that other creditors of the estate, if there be any, may be discriminated against.

The plaintiff in error cannot escape just liability under such pretext or claim.

Such amendment was not intended to prevent a state from arranging and parceling out the jurisdiction of its several courts as it sees fit.

Bowman v. Lewis, 101 U. S., 22, *supra.*

The Pres. etc. v. Lowery, 93 U. S., 72, *supra.*

McCready v. Commonwealth, 94 U. S., 391.

Robinson v. Ocean Steam Navigation Co., 112 N. Y., 315, *supra.*

Haney v. Marshall, 9 Maryland, 194, *supra.*

Hayes v. Mo., 120 U. S., 68, *supra.*

The plaintiff in error was not deprived of property without the process of law.

The action was duly commenced and prosecuted with personal appearance of the defendant and with all of the forms and solemnities

of judicial proceedings provided by the constitution and laws of the state, and in all respects as every other controversy between individuals concerning property and property rights are tried and determined in that state.

"Due process of law" and "the law of the land" are synonymous, and by such terms it is clearly intended that reference is had to the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.

Cooley Const. Lim., 353.

Hovey v. Elliott, 167 U. S., at 418.

Rearson v. Yewdell, 95 U. S., 294.

Blake v. McClung, 172 U. S., 254 at 257.

Sully v. Am. Nat'l Bank, 178 U. S., at 302.

Campbell v. Holt, 115 U. S., 620.

Provident Inst. etc. v. Jersey City, 113 U. S., 506.

Arrowsmith v. Harmoning, 118 U. S., 194.

Central Land Co. v. Laidley, 159 U. S. 103.

It is not contended by defendant in error that an "executor" is not a person "within the meaning of the constitutional provision forbidding the deprivation of property without due process of law or the denial of the equal protection of the law. The claim is that he is not a 'citizen' of a state or of the United States within the provision entitling him to and prohibiting the denial to him of all the privileges and immunities of citizens of the several states and of the United States."

Blake v. McClung, 172 U. S., at 259.

The remaining errors as specified and urged are the claimed errors of the Supreme Court of the State of Kansas in affirming the decision and judgment of the District Court of Atchison County, and the answers to the claimed errors of the District Court as hereinbefore presented fully meet the objections so made by the plaintiff in error. As the decision of the District Court was correct under the authorities above cited, it follows that the decision of the Supreme Court affirming the same, was also correct.

Even if the judgment of the District Court was erroneous upon such constitutional grounds as urged, the original judgment of that court was decisive of the case and concluded the plaintiff in error as to his supplemental motions and the judgment of the Supreme Court in this case was not erroneous. Such judgment of the Dis-

trict Court not having been appealed from or, what is the same thing, the appeal therefrom having been dismissed, and its judgment permitted to stand, the law of *res adjudicata* applies thereto with full force, and the Supreme Court upon such rule alone, should have rendered the decision in this case which it did render and from which the writ of error issued to this court.

If the case is considered upon its merits we urge that the decision of the Supreme Court of the State of Kansas should be affirmed.

Respectfully submitted,

JACKSON & JACKSON,
Attorneys for Defendant in Error.

HORACE M. JACKSON AND
JAMES F. TUFTS
of Counsel.

No. 120.

Ex. of Tufts v Jackson for D.

Office Supreme Court U.S.
FILED
DEC 2 1902
JAMES H. McKENNEY,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

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No. 120.

REUBEN M. MANLEY, Executor of the Estate of GEORGE MANLEY, deceased,
Plaintiff in Error;
vs.
ANNA O. PARK, Successor in Interest and substituted for RICHARD A. PARK, deceased,
Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR.

JACKSON & JACKSON,
Attorneys for Defendant in Error.

THE HOBB PRINTING CO., ATCHISON, KANSAS.

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ARGUMENT OF DEFENDANT IN ERROR.

Defendant in error having filed motion to dismiss or affirm is required by the rule of court to submit her brief thereon thirty days before the hearing of such motion. For that reason, defendant in error submitted her brief thereon and therewith her brief on the merits before brief of plaintiff in error was received.

Having now examined the brief of plaintiff

in error, we beg to submit the following argument:

UPON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

The issues in the trial court, upon which the case was tried and judgment rendered, presented no Federal question. The petition stated a cause of action under the Kansas Code (Record, p. 5). The answer of defendant, plaintiff in error, presented no Federal question (Record, p. 22), and the reply responsive thereto presented no such question. Upon such issues trial was had and judgment rendered December 15, 1897 (Record, p. 29). Proceedings in error were then taken to the Supreme Court of Kansas by the defendant below, by that court dismissed and mandate of dismissal filed in the District Court December 12, 1899 (Record, p. 34).

By such original judgment every question which was or could have been raised as a defense to the plaintiff's cause of action, was conclusively adjudicated, including the construction and constitutionality of the statutes involved therein, and could not again be raised either in the same or in other action or in any proceeding involving the validity of such judgment. The claim is made by defendant below that the statute under which such action was prosecuted was in conflict with both the state and Federal constitution, and that the court for that reason

did not have jurisdiction to render the same, and hence its judgment is void, and raised such question by motions to set aside the judgment and order of sale thereon. The case was tried upon such motions only, with judgment against the defendant below, proceedings in error to the Supreme Court of Kansas and there affirmed, upon the ground and for the reason, as stated by the court, that the original judgment was final and conclusive and necessarily involved all of the questions raised by such motions.

Just here is the distinction between the contention of defendant in error and plaintiff in error; the former urging that the original judgment was *res judicata* as to all such questions and therefore that any questions, Federal or other, raised by the supplemental motions were not presented in time, while plaintiff in error contends that the decision on such supplemental motions was upon original proceedings and that any question raised therein should be considered accordingly. In other words, the claim is, that every succeeding step raised or presented by him, is independent of the original judgment and must be treated in all respects as an original proceeding, as though no original judgment, though involving the same question, had been rendered. This is clearly evident from examination of the brief of plaintiff in error upon motion to dismiss or affirm (pp. 15 to 32).

The judgment of the Supreme Court of Kan-

sas (Record, pp. 44 to 49) was rendered solely upon the ground that the original decision, whether correct or otherwise, until reversed, was binding on every other court, and for that reason and that alone, the judgment of that court was against the motions of plaintiff in error.

The claimed Federal question was not raised in time.

Such motion of the plaintiff in error was just as clearly an attempt to review and if possible, secure a reversal of the original judgment upon the grounds stated in such motion, as though they had been presented by a petition for re-hearing after the final judgment of the court below, and such fact cannot be covered up by the pretext that the original judgment was void for want of jurisdiction of the court, based solely upon the claimed error of the court in holding that the law under which the judgment was rendered was constitutional. The constitutionality of any statute under which

redress is sought and upon which the claimed right of recovery or defense is based, is just as clearly within the issues as though specifically pleaded.

Such Federal question having thus been first raised after the final judgment of the court below and after the judgment of the Supreme Court dismissing the proceedings, and by supplemental motions, was, therefore, not presented until after the first appeal and the judgment had become conclusive upon that and all other courts. Any other construction of this rule permits an indirect attack upon the judgment and operates as a second appeal.

That a Federal question may be first raised in the Supreme Court of a state, we have not controverted. Our contention is that it cannot be raised in the Supreme Court or elsewhere upon second appeal nor after an original judgment has been rendered, from which no appeal or proceedings in error has been taken. The question must at least be raised before the judgment has obtained the condition of *res judicata*, as after it has acquired that condition, no question, Federal or otherwise, based upon the original cause of action or defense, can be raised.

The Federal question may, under the rule stated, be raised at any time before the original judgment becomes final and conclusive, as, on motion for a new trial, or upon petition in

error to the Appellate Court, or by brief in that court, or by petition for re-hearing before that court has rendered a final judgment. After the judgment has become final and conclusive, it cannot be raised either upon second appeal or by petition for re-hearing after final judgment rendered by the Supreme or Appellate Court. This rule is clearly stated in the cases cited in support of motion of defendant in error to dismiss.

The cases cited upon the motion in brief of plaintiff in error upon that ground are not in conflict with this rule.

In Sully v. American National Bank, 178 U. S., 209, the question was raised in the Supreme Court *before final judgment*, and there held that that court decided against the plaintiff in error *on that question*, not on the ground that it had not been raised in the lower court. In this case, the Supreme Court decided against the claimed Federal question for that the original judgment was *res judicata*. Such question could not therefore have been involved.

In Consolidated Coal Co. v. The People, 185 U. S., the Federal question was presented in a motion in arrest of judgment and before final judgment in the cause.

In Endowment & Benev. Assn. of Kan. v. Kansas, 120 U. S., 123, it was presented in a motion for a new trial in the District Court.

In Clark v. Pennsylvania, 128 U. S., 395, it was raised in instructions in the trial court.

In Kennebeck R. Co. v. Portland R. Co., 81 U. S., 23, the Federal question was discussed in the State Supreme Court and decided before final judgment was rendered therein.

In C. B. & Q. R. Co. v. Chicago, 166 U. S. 226, the question was raised in motion for a new trial.

In Rothschild v. Knight, 184, U. S., 589, it was raised before the final opinion of the Supreme Court was certified.

No Federal question was decided or necessary to the decision.

The decision was clearly upon grounds other than a Federal question. The decision of the State Supreme Court fully sustains this contention. The reasons given for affirming the decision of the lower court were based solely upon the doctrine of *res judicata* and an examination of such decision discloses that no other question was regarded by the court in its decision. While that court discussed other questions, its decision was upon that ground and that only.

Plaintiff in error urges that such decision in effect holds that the statute of Kansas relied upon by defendant in error, is not repugnant

to the constitution of the United States, but the decision is upon the ground that the court was bound by the former judgment of the trial court. The plaintiff in error claims that the original judgment was void for want of jurisdiction of the trial court, but rests such claimed want of jurisdiction, not upon the ground that the court did not have jurisdiction of that class of cases, nor that the law creating the court was unconstitutional, but upon the ground that the District Court erred in holding that the statute giving the right to prosecute the action in that form was in conflict with the constitution. The argument is that the claimed error of the court in rendering the original judgment was want of jurisdiction, and in support of such argument cites numerous cases which are not in point, and among others the following:

In National Foundry Co. v. Oconto etc., 183 U. S., 216, the state court decided in favor of one Federal decree and against the effect of another, and because of the decision in the latter respect it was properly held that a Federal question was decided.

In Capital City etc. Co. v. State ex rel. 183 U. S., 283, a corporation was ousted of its franchises because it violated all of certain statutes, some of which were and some were not in conflict with the Federal constitution, and it was held that to the extent that such decision was

upon the statutes which were in conflict with the federal constitution, a Federal question was certainly involved.

In M. K. & T. Ry. Co. v. Elliott, 184 U. S. 695, a Federal question was in fact involved but the state court declared that no such question was presented and it was properly held that the state court could not, by such ruling, exclude from the case the Federal question which was actually presented.

In Anderson v. Carkins, 135 U. S., 483, the defendants claimed protection under the homestead laws of Congress, which claim was not sustained by the state court and it was again correctly held that the state court could not exclude a question actually presented by deciding that it was not involved.

In Columbia, etc., Co. v. Light & Power Co., 172 U. S., 475, a contract was involved which was subject to two constructions, by one of which it was impaired by state legislation, and by another it was not. The state court so construed the contract that it was not impaired by legislation, and refused the other construction, and it was held that such decision involved all the legal questions presented of impairment as well as non-impairment, and for that reason the Federal question was involved.

In McCully v. Virginia, 172 U. S., 102, cited in the last case, it was held that a decision of

a state court that a later statute did not impair a contract made under a prior statute, involved a Federal question and correctly so, because the question of impairment was a Federal question, and that question was, in fact, decided by the state court and could not be excluded by its construction of the contract.

In First National Bank v. Anderson, 172 U. S., 573, the state court decided that the National Banking Act did not prohibit the sale of certain collaterals and was clearly a construction of that Act and involved a Federal question arising thereunder.

In Bank v. Townsend, 139 U. S., 67, the same question of construction was presented and decided by the state court, and it was also there held that a Federal question was presented.

The decisions so relied upon do not in any respect conflict with the rule that where no Federal question was, in fact, necessary to the decision of the state court, and such decision was clearly upon grounds other than those involving a Federal question this court will not take jurisdiction, nor do the facts stated therein indicate that in this case such question was involved.

UPON THE MERITS OF THE CASE.

If the court shall hold that it has jurisdiction and considers the case upon its merits, the decision must be affirmed.

The specifications of error, as relied upon by plaintiff in error, involved three dissimilar propositions. The first and second (pp. 39 to 67, br. plff. in error) relate entirely to the construction of the laws of the State of Kansas and of the constitution of that state and to the question of such laws being void as in violation of such constitution.

Counsel therein asks this court to review the decision of the court of last resort of the State of Kansas and reverse such decision upon the ground that such court erred in the construction of the statute and constitution of that state, and to disregard the rule long recognized by this court, that it considers itself bound by the construction of the statutes and of the state constitution and the validity of such statute, when given by courts of last resort of the state, and presents at great length reasons which, in his judgment, show the error of the Supreme Court of Kansas in the con-

struction so by it given to the constitution and laws of the state.

We might pass this question upon the propositions and authorities submitted in brief of defendant in error (p. 20), but for the very great errors in the argument of plaintiff in error and statements of the statutes of that state, to which we now beg to call the attention of the court.

In quoting such statutes, counsel has not called attention to certain connecting sections which indicate those relating to domiciliary administration, and those relating to auxiliary administration.

By so doing, he makes the sections relating solely to domiciliary administrations apply, apparently, to administration upon estates of non-resident decedents, and states his conclusions thereon briefly, as follows:

"That such statutes give the Probate Courts exclusive jurisdiction in the matter of allowing claims against the estates of deceased persons.

"That suits may be instituted in courts of record to establish such claims, but the judgment rendered must, nevertheless, be exhibited and allowed by the Probate Court."

That the property of the estate cannot be attached.

That it is the established law in Kansas that the property of a dead man cannot be sold under execution, citing Achenbach v. Pomeroy Coal Co. 2 Kan. App. 357; Mendenhall v. Burnette, 58 Kan., 355. Br. plff. in error pp. 41-2.

Such claim is made upon Secs. 80, 83, 84, 86 of the Executor's and Administrator's Act, all of which relate to the granting of letters of administration by Probate Courts upon the estates of deceased residents of the state, not upon the estates of non-residents, and the same apply only to cases where administration is in fact granted by the Probate Court and not to estates upon which no letters are granted by such court. Such sections of the statute do not in any respect, refer to the estates of non-resident decedents, *upon which letters of administration have not been granted by any Probate Court*, as to which estates an entirely different statute applies, to wit:

"Sec. 3009. (G. S. 1901). An executor or administrator duly appointed in any other state or county may sue or be sued in any court in this state, in like manner and under like restrictions as a non-resident may sue or be sued."

After quoting certain other sections of the statute (br. pp. 42 to 46) counsel states as deductions therefrom the following proposition: "The issuing of letters testamentary to a non-resident executor is plainly allowable under Sec. 144 of the Executor's and Administrator's act, and Secs. 24 and 25 of the Will's Act."

Such Sec. 144 does not authorize the granting of letters testamentary or of administration to non-resident executors, but only that a non-resident executor, or administrator, if no resident be appointed, may file a copy of his appointment and may thereafter be authorized to sell the real estate for the payment of debts or legacies. The authority is *to sell the* real estate.

Such statute does not authorize the issuing of letters to such non-resident, on the contrary, the granting of such letters is expressly prohibited by the

"Sec. 2833. (G. S. 1901) which so far as relates to the granting of letters, provides: "Letters testamentary and of administration shall in no case be granted to a non-resident of this state."

Sec. 24 of the Will's Act provides only that foreign wills relative to property in Kansas may be admitted to record and when so admitted have the same validity as wills made in this state, as evidence of title, and Sec. 28 of such act provides that after such wills are admitted to record pursuant to the four preceding sections (Secs. 24-27) the court may grant letters of administration with the will annexed but only to residents under Sec. 2833, *supra*.

Such sections are as follows:

"Sec. 24. Authenticated copies of wills executed and proved according to the laws of any state or territory of the United States, relative

to any property in this state, may be admitted to record in the Probate Court of any county in this state where any part of such property may be situated; and such authenticated copies so recorded shall have the same validity as wills made in this state in conformity with the laws thereof. When any such will or authenticated copy has been or shall thereafter be admitted to record in the Probate Court of any county in this state where any part of such property may be situated, a copy of such recorded will, with a copy of the order to record the same annexed thereto, certified by the Probate Court under the seal of his court, may be filed and recorded in the office of the Probate Court of any other county in this state where any part of such property is situated; and it shall be as effectual in all cases as the authenticated copy of said will would be if proved and admitted to record by the court.

"Sec. 28. After allowing and admitting to record a will pursuant to the four preceding sections of this act, the court may grant letters testamentary thereon, or letters of administration with the will annexed, and may proceed in the settlement of the estate that may be found in this state: and the executor taking out letters, or the administrator with the will annexed, shall have the same power to sell and convey the real and personal estate, by virtue of the will or the law, as other executors or administrators with the will annexed shall or may have by law."

It is further asserted by plaintiff in error that by Sec. 144 of such statutes the estate of a non-resident executor is fully protected from attachment suits and placed in the custody of the Probate Court (br. p. 46). Such Section 144, as above suggested, permits the authenticated copy of the will to be filed for the purpose only of making sale of the real estate for the payment of debts and legacies, and in no respect authorizes the Probate Court to allow claims against the estate.

In support of such claim, it is further said by counsel (p. 47) that under Sec. 7 of the Executor's and Administrator's Act, the executor may be cited by the court to qualify, and upon his refusal the Probate Court shall commit administration of the estate, with will annexed to some other person. Sec. 7 relates only to estates of deceased residents, and is as follows:

"Sec. 7. If any person who is appointed an executor shall refuse to accept the trust, or if, after being duly cited for that purpose, he shall neglect to appear and accept the same, or if he shall neglect for twenty days after the probate of the will, to give bond as before prescribed, the court shall grant letters testamentary to the other executors, if there be any capable and willing to accept the trust: and if there is no such other executor, the court shall commit administration of the estate, with the will annexed, to the widow of the deceased, or to his next of kin, or to such other person as would have been entitled thereto, if the deceased had died intestate."

Secs. 1 to 30, relate entirely to resident

executors, and Sec. 28 above quoted, prohibits the granting of letters to non-residents of the state.

Such is well understood to be the meaning of said Sec. 7. How would it be possible for the Probate Court to cite a non-resident executor living in the state of New Jersey to qualify?

In Howell v. Mangelsdorf, 33 Kan., 194, Amsburg v. Exchange Bank, 33 Kan., 100, it was expressly held that no service even though made personally upon a party beyond the boundaries of the state would give the court jurisdiction over the person so served. The Howell case cites Rorer on Inter-State Law, 22. Freeman on Judgments, Sec. 564. Coleman's Appeal, 75 Pa. St., 441. Wells on Jurisdiction of Courts, Sec. 113.

It was not intended to authorize, as the ground of granting letters of administration, that the Probate Court should perform the useless act of attempting to have a citation served upon a non-resident, and it is certain that such Sec. 7 refers soley to parties resident of the State of Kansas and who may be entitled to letters testamentary or of administration, and this even though the statute (Sec. 28) did not expressly prohibit the appointment of non-residents. Under such statutes a resident administrator with will anexed might have been appointed upon the estate of George

Manley, deceased, but in the absence of such appointment and the taking charge of the estate of said deceased within Atchison County, the statute (Sec. 203) expressly provides that in such case suit may be brought in the District Court. Such section is as follows:

"Sec. 203. An executor or administrator duly appointed in other state or county may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may sue or be sued."

The case of Achenbach v. Pomeroy Coal Co. v. Kansas Appeal, 375, is said by counsel for plaintiff in error to be "exactly in point," and also that "an individual creditor could not, by execution, absorb more than his pro rata share of the dead man's estate." Such case is in no respect in point and no such rule is stated therein as clearly appears from the decision. In such case, Achenbach was a resident administrator, duly appointed by the Probate Court, and the plaintiff therein sought to obtain an execution out of the District Court against such administrator to be satisfied by sale by the sheriff of the property in the hands of such administrator, and which property was at that time in the custody of the Probate Court, and the court held that the estate being administered upon in the Probate Court, an individual creditor could not obtain execution against the administrator nor by that means collect any part of his claim, pro rata or otherwise; that,

as the estate was in the custody of the Probate Court of the county and being there administrated, the District Court had no jurisdiction to order an execution to be satisfied by the sale of such property.

In the case of Mendenhall v. Burnette, 58 Kan., 355, also cited by plaintiff in error in support of this proposition (brief, p. 42), a judgment had been obtained against decedent in his life time, which, after his death, was revived against his personal representative and thereon an execution ordered for the sale of the real property upon which such judgment was a lien at the time of the death of the intestate, and the court there held that such execution could be levied upon the real property which was subject to the lien of such judgment in the life time of the debtor, but could not be levied upon any other property, real or personal, of the estate of such debtor and in no respect sustains the contention of the plaintiff in error.

The rights and liabilities of foreign executors and administrators are fixed by the statute of the state where they seek to enforce the one or evade the other.

It is a question purely of state statute and for that reason decisions of courts of other states, based upon the statutes of such states, afford no aid in construing the law of such state.

And again the rule that this court considers itself bound by the construction and validity of the state constitution and statute as given by the courts of last resort of the state prevails.

Burgess v. Seligman, 107 U. S., 20., 6 Syll., also 69 U. S. 210 at 216., 94 U. S. 260-268.

For which reason, we do not consider the authorities cited (pp. 50-51, br. plff. in error). Nor is the question of the equitable jurisdiction of the District Court, which arises in suits in equity, involved.

Such cases rest upon an entirely different ground, which it is readily perceived, does not apply in this case.

The rule of the decision of the Kansas Supreme Court in Cady v. Bard, 21 Kan., 667, and the rule there discussed and stated, that a non-resident executor or administrator may sue or be sued, and the many decisions following that, cannot be evaded by the mere suggestion that "attaching the mortgaged land was, therefore, an idle proceeding." (Brief plff. in error p. 53).

Under numerous decisions of the state of Kansas, a plaintiff may have an attachment against mortgaged as well as other lands and may have a judgment for the entire amount of the debt, and there is not in the opinion of the court in that case, anything which sus-

tains the claim of counsel that such attachment was "an idle proceeding."

The suit was not to foreclose a mortgage as statee in such brief but to recover on *a contract* alleged to have been made by the defendants *in the foreclosure of a mortgage on real estate.* Property was attached, and service sought by publication. A motion to set aside such service upon the ground now urged by plaintiff in error, was sustained by the trial court, and the error of the court in such ruling, was the question presented to and decided by the Supreme Court. It does *not appear* from the statement of the case as claimed by plaintiff in error (brief, p. 53) that it was an action to "foreclose a mortgage" nor that such decision "was properly reversed by the Supreme Court because service could be had against them by publication in an action to foreclose a mortgage".

Suit in equity was not proper under the Kansas law.

Under the Kansas Code (Sec. 4438, G. S. 1901), "The distinction between actions at law and suits in equity" is abolished, and the statute also, as quoted, in our brief expressly authorizes suits of the nature of this one to be commenced by attachment of property, and gave the plaintiff a remedy at law, which remedy will not be denied to the plaintiff because, in other states, the same relief might have been had by a suit in equity. The correctness of the judgment of the Kansas Court must be determined by the statutes of that state and not by those of other states, for which reason we deem it wholly unnecessary to discuss many of the authorities cited in brief of plaintiff in error, pp. 54 to 67.

Many authorities are also cited in which the power of a court of general jurisdiction to appropriate assets of an estate was denied, for the reason, as stated therein, that the *jurisdiction of a Probate Court had already attached* to such assets before the proceedings in a court of record, and that such assets were in *gremio legis*, and this upon the well recognized rule that the court first acquiring jurisdiction of the assets, retains the same to the exclusion of all other courts.

For that reason, the District Court properly retained jurisdiction and rendered the judgment, as no administration had been commenced in Kansas upon the estate of George Manley, de-

ceased, and having first obtained jurisdiction thereof it would be retained. But, in this case, no other court acquired jurisdiction. The copy of the will and of the appointment of the executor by the court in New Jersey was filed in the Kansas Probate Court January 11, 1896, several months after the commencement of suit by plaintiff below, but no further proceedings were taken or administration had and such Probate Court therefore never obtained jurisdiction of the assets of such estate. The State of Kansas stands almost alone in the matter of authorizing the prosecution of suits by and against foreign executors. Such law is commented upon and approved in Reno on Non-Residents, Secs. 59-60, and in 1, Woerner on American Law of Administration (2nd Ed. Sec. 160) where it is said: "No executor or administrator can, in his official capacity, originate or maintain an action in the courts of any country, save that which has granted him letters testamentary or of administration, without authority from a country in which he brings the action;" and Sec. 163, where it is said: "and where the statute authorizes them to sue and be sued, in like manner as a non-resident may be sued, an attachment against them will divest them of all interest in the property attached." With citation of the Kansas statute authorizing such action and Cady v. Baird, *supra*.

Counsel has further cited in support of his

contention many authorities in which the controversy arose in cases in which local administration had first been granted by the proper Probate Court, and there was an attempt by subsequent proceedings in another court to appropriate certain assets, and also cases in which it was held that an executor may do certain things to protect the estate before the will is admitted to probate and when the will is so probated, it relates back to the death of the testator, but all such cases involved only the question in the state of the executor's domicile and appointment, and must be distinguished from this case and from other cases in which the controversy is between an executor, resident of and appointed by the laws of one state, and the appropriation of the assets of the estate situated in and controlled by the laws of another state.

Plaintiff in error in his brief and argument has entirely abandoned all error based upon the claim contained in specification of error one that the District Court of Atchison County, Kansas, did not give full faith and credit to the public acts and judicial proceedings of the surrogate of the Orphans Court of Union County, New Jersey, and also the claim that plaintiff in

error had been deprived of his property without due process of law.

The statutes of Kansas are not in conflict with Sec. 2, Art. 4, or the Fourteenth Amendment to the Constitution of the United States.

The specifications of errors based upon the claim that the statutes of Kansas under which the suit was prosecuted to judgment in the courts of that state, are in violation of such provisions (and in his brief numbered Third, Fourth and Fifth (pp. 67-8),) present in fact a single question, to wit:

Does such statute of Kansas fail to accord to the plaintiff in error, as a citizen of New Jersey, all the privileges and immunities to which he is entitled, or does it abridge such privileges, within the meaning of such provisions? The statutes of Kansas provide that upon the decease of any inhabitant of the state, letters testamentary or of administration on his estate, may be granted by the Probate Court of the county in which the deceased was

an inhabitant, and that upon the decease of a person intestate in any other state or county, leaving an estate, administration thereof may be granted by the Probate Court of any county in which there is an estate to be administered, and that such administration shall extend to all of the estate of the deceased within that state. Sec. 1, Executor's and Administrator's Act. It also provides that letters testamentary and of administration shall in no case be granted to a non-resident of the state. Sec. 28 same act. It also provides that if wills be executed and proved according to the laws of any other state or territory relative to property in the State of Kansas, they may be admitted to record in the Probate Court and when so recorded, shall have the same validity as wills made in that state. Sec. 144 same act. Also, that when so recorded, the court may grant letters testamentary or of administration with the will annexed, but only to a person resident of the state, and then may proceed in the settlement of the estate that may be found in that state. Secs. 144 and 174 same act. Under the statutes of that state, when letters testamentary or of administration are granted by a Probate Court, the entire estate within the State of Kansas is thereby drawn into the jurisdiction of that court and claims must be allowed in that and paid pro rata in the order of priority from the estate to be sold by order of that court.

It is further provided by such statutes that any non-resident may sue or be sued in the general courts of that state in all respects as a resident, and that in certain cases suits may be brought by attachment upon the ground of non-residence of the defendant.

It is also a provision of such statute (Sec. 203 above quoted) that non-resident creditors and administrators may sue or be sued in their capacity of executors or administrators in like manner as other non-residents.

The sole question presented by such assignments of errors three, four and five is:

Does such last mentioned section deprive the plaintiff in error of any privilege or immunity or abridge any privilege to which he, as an executor appointed under the laws of New Jersey, is entitled?

The claim that it has such effect is based upon the ground that in case of a resident administrator, the estate must be divided pro rata among the creditors thereof and cannot be appropriated by one or more of such creditors by attachment proceedings, whereas, under such Section 203, a non-resident executor having property of the estate within such state, may be sued by attachment and the property appropriated by the attaching creditor or creditors to the exclusion of any other creditor.

But no creditor is making such claim.

Any estate within that state could be appropriated for the payment of debts and under such statutes, the non-resident executor can receive and hold whatever of the assets may remain after the payment of such creditors. Such non-resident executor is, therefore, not deprived of any money or property by such proceeding. In either case, of local administration in the Probate Court or suit by attachment, so much of the estate as is necessary to pay the claims presented to the Probate Court or exhausted by attachment, will be appropriated in payment of such claims. The non-resident executor or administrator is entitled to and can receive whatever remains of the estate

In either case, the property of the estate, to the extent necessary to pay such debts is exhausted, and the non-resident executor is entitled to and can receive the balance. He is not, therefore, deprived of any money or property, nor of any privilege whatever unless it be the naked privilege of administering the estate in Kansas while he continues a non-resident and is entirely beyond the reach of the process of the Kansas courts.

It was never intended, by such provisions of the constitution to authorize an officer appointed by the court or laws of one state, to carry into another state and there enforce or execute the authority vested in him by virtue of the office which he fills. If such construc-

tion gives such right to an executor or administrator appointed by the courts of New Jersey, it would give the same right to the sheriff, coroner, marshal, judge or governor of such other state. If the authority of an officer of one state, under such provision of the statute of his state, authorizes him to go into a sister state, and there exercise such authority, the jurisdiction of the different states and of their officers ceases to be limited by the state boundaries, and all the provisions of respective statutes, as to the exercise of official authority, extends throughout all the other states of the United States, and state lines and state jurisdiction is abolished and we have in place of the jurisdiction, power and authority of the respective state officers, in each state, the jurisdiction, power and authority in each state of the officers of all the different states acting under the laws and the directions and orders of the courts of the different states.

The rule urged by plaintiff in error, that the executor of New Jersey, appointed under the laws and acting under the orders of the court by which he was appointed, has such power and authority in the State of Kansas, leads unavoidably to such condition and proves that his conclusion is *reductio ad absurdum*.

Such provisions were not adopted with the purpose and intention that they should be given such effect.

In addition to this, the statutes of Kansas have made ample provision for the administration of the estate of non-resident decedents, by authorizing those interested therein to proceed ing one of the Probate Courts of the county in Kansas in which there is property of such decedent, and there have an administrator appointed and have the estate administered, in all respects as the estates or resident decedents are administered, and in which case the property of such estates could not be appropriated by attachment or other proceeding in the courts of record. But such foreign administrators or executors, or others interested in the estate of non-resident decedents, cannot, while refusing to have resident administration of such estates in the Probate Court, deny to any other creditor the right to appropriate the property of such decedent to the payment of the claims of such creditors. If the parties interested in the estate of such non-resident decedents refuse to have administration in the Probate Court, they cannot thereby compel a resident creditor to proceed in the Probate Court for the benefit of all the creditors of such estate, instead of proceeding in the District Court for their own benefit by attachment of the property of the estate.

Under such laws of Kansas, the non-resident executor or administrator has the same right to prosecute suits against other parties, resident and non-resident, as is given to resi-

dents of the state. They are not, therefore, deprived of any privilege or immunity which is given to any other person or persons. So far as the estate of the non-resident decedent or non-resident executor thereof is concerned, it is wholly immaterial whether it be appropriated in payment of debts by proceedings in one court or another; in the Probate Court or in the District Court; by sale of property by an administrator or by a sheriff, and such provisions of the constitution could never have been intended to prevent a state from arranging and parcelling out the jurisdiction of its several courts at its discretion.

The sole distinction between the two classes is that of residence and non-residence; a distinction which, in the nature of things, must exist, and in the proceedings against such classes, a difference must of necessity be made in the procedure and in the process by which jurisdiction is obtained. In the case of the resident, the court can obtain jurisdiction of the person and of the property. In case of the non-resident, jurisdiction cannot be obtained of the person. Only the *res* can be brought within the jurisdiction of the court. If this distinction is not to be recognized in the State of Kansas, it cannot be recognized in any other state, with the result that the property of a non-resident debtor in a state other than that of his residence cannot be appropriated in the payment

of his debts whether the creditor be a resident or non-resident, for no jurisdiction can be obtained over the person. To prevent such fraud in the withholding of property in the payment of just debts, the states must be permitted to authorize such proceedings in the courts as will enable them to appropriate the property of the non-resident estate as they cannot obtain jurisdiction over the person.

Such statutes authorize the same proceeding against all non-residents, and in favor of all non-residents, and operate alike on all persons and property similarly situated and so the equal protection of the laws cannot be said to be denied.

Walston v. Nevin, 128 U. S., 578.

Mo. P. Ry. Co. v. Macky, 127 U. S., 205.

The amendment could never have been intended to prevent a state from arranging and parceling out the jurisdiction of its several courts at its discretion.

Bowman v. Lewis, 101 U. S., 22.

Hayes v. Missouri, 120 U. S., 68.

By the sixth specification of error urged by plaintiff in error (br. p. 102), it is contended that because jurisdiction was obtained over the person of the plaintiff in error by attachment of the property in his charge, and because attachment was unauthorized, the court obtained no jurisdiction over the person or property and for that reason the judgment was void and not *res judicata*, and that the plaintiff in error had the right to have it set aside at any time by motion.

This involves questions of jurisdiction of the person, jurisdiction of the subject matter and that because the court erred, if it did err, in holding that the law under which the attachment was sustained was constitutional, such judgment was void and therefore not *res judicata*.

The plaintiff voluntarily appeared and thus gave the court jurisdiction of his person.

Such voluntary appearance was first, by demurrer, then by answer and full appearance at the trial, and having voluntarily submitted himself to the jurisdiction of the court, he cannot now be heard to complain that the court did not have jurisdiction of the person.

Under the statutes of Kansas, the property could be attached, the defendant being a non-resident executor having property which was attached in the State of Kansas, for the collection of a liability due from a stockholder, which is a contractual liability and one for the collection of which property may be attached on the ground of non-residence of the defendant, and the court had, therefore, jurisdiction of the subject matter.

No error of the court in the construction of any law or constitution can defeat its jurisdiction over the subject matter.

Having jurisdiction of actions of the same general nature, it had jurisdiction of this action and of the subject matter thereof, and the fact, if it is a fact, that the court erred in the construction of the law or in holding that the same was not in conflict with the constitution of either the State of Kansas or of the United States, could not defeat jurisdiction over the subject matter. If the court had held that such statute of Kansas was in conflict with the state or Federal constitution and rendered judgment in favor of the defendant, no question could ever arise that such judgment would

not have been within the jurisdiction of the court, and valid and binding. The estoppel of judgment must be mutual. It must be good as to both parties or bad as to both. Had the contention of the defendant below, plaintiff in error, prevailed in the state court and that court thereon had held that the action could not have been maintained by the plaintiff by attachment, such judgment would have been binding upon the plaintiff below and he could not have subsequently prosecuted a further suit upon such claim. The court having jurisdiction of the cause of action had jurisdiction to decide wrong as well as right, and its jurisdiction was not affected in any respect by any error in the judgment rendered. The judgment was, therefore, made by a court having jurisdiction of the person and of the subject matter, and is *res judicata* even though erroneous.

We concede that if the court did not have jurisdiction of the person or of the subject matter, its judgment was void and might be attacked by motion to vacate, but since it was not void but at most only erroneous, it could not be so attacked except by proceedings in error or appeal, which proceeding the plaintiff in error failed to pursue and such judgment was affirmed by the Supreme Court by dismissal. There is no question in this case of a judgment having been rendered by a self-

constituted body or a court not empowered by its government to take cognizance of the subject it decided, nor any question of the power of the court to have rendered a judgment in this case against the plaintiff below, nor to have rendered the judgment it did render in favor of plaintiff below.

Even where a court has jurisdiction of a general class of cases there may be specific limitation upon the power of the court as to certain specific cases within such class, and where there is such specific limitation, a judgment in excess thereof would be beyond the jurisdiction of the court and void. Such was the case in United States v. Walker, 109 U. S., 258, in which the court having probate jurisdiction ordered a discharged administrator to pay over moneys received by him as such *to his successor.*

Under the statute, the court had no power to order such moneys to be so paid, but only to order the discharged administrator to deliver the estate *not administered* to his successor.

In a suit upon the administrator's bond, breach was alleged based upon the failure of such administrator to pay over the money collected by him to his successor, as so ordered by the court, and it was held that the order of the court having probate jurisdiction was to that extent void, and the failure to pay such money

to the administrator *de bonis non* did not give him a right of action upon the bond of the discharged administrator, to recover the money so collected.

Such case fairly illustrates the distinction between judgments in excess of the power of the court, but in a class of cases of which the court has jurisdiction, and cases in which the judgment of the court is simply erroneous or wrong by reason of misconstruction of a statute or constitution.

In the one case, the judgment is beyond the express jurisdiction of the court as limited by statute, and void; in the other case, it is simply erroneous and not void. Of a similar nature is the class of cases in which the judgment is rendered entirely outside of the issues in the case. In such case, judgment beyond the issues is upon a matter not submitted to the court for its determination and a nullity. In such case, the court would not have jurisdiction of the subject matter, because the same was not presented to it for determination. The case at bar is not within either or any like exception nor within any of the exceptions to the general rule stated in the reasons and authorities cited in brief of plaintiff in error. In this case the District Court had jurisdiction of cases of the same general nature. There was no specific limitation upon the power

of the court in this particular case or cases or like nature, nor was the original judgment of the court outside of the issues presented and was not therefore void and could not be attached by motion to set aside, and the decision of the Supreme Court of Kansas denying such motion was correct.

There was no error in the order of Sale by terms of the original judgment of the property attached.

The seventh specification of error, that the order of the District Court directing the sale of attached property was not *res judicata*, and for that reason might be contested and should have been set aside on motion of plaintiff in error, is neither well taken nor fairly discussed.

Such error is not included within the assignments of errors filed. (Record p. 53.)

Such error, if error it was, is based upon the construction of the Kansas statute, practice

and decisions, and upon alleged error under the rules established therein. Such question of practice and the construction of the Kansas constitution and statutes in relation thereto, is binding upon this court. At least, this court considers itself bound thereby and such error, if it was an error, will not be reviewed by this court.

The argument is made that an order to sell attached property is not *res judicata*. The argument that the property was "exempt from judicial process", is an attempt to apply a rule of law which exists in those cases in which property is *exempt*, to this case in which the claim relied upon, is the error of the court in rendering the judgment and order of sale.

In support of such contention plaintiff in error has cited a number of Kansas decisions in cases which arose and depended upon the confirmations of sales of real estate, and in which cases it was held that "confirmation of execution sales of real estate involved only the regularity of such proceedings and did not involve or decide the title or any other question, and such decisions were, for that reason, not *res judicata* as to any question of title, ex-

emption or any question not involved in the proceedings relating to such sales, and for the reason stated to wit: that the confirmation of such sales involved only the regularity of the proceedings therein.

The authorities cited in no respect apply to the doctrine of *res judicata* as to the effect of the judgment, including the order for sale of attached property which, under the statutes of Kansas, is a part of the judgment and such authorities only apply to the proceedings directly relating to the sales.

Such claimed assignment of error is, therefore, not involved in this case nor are the authorities in support thereof in any respect in point.

To recapitulate we respectfully submit that the Federal questions relied upon by plaintiff in error were not raised in time, were not involved in or necessary to the decision of the Supreme Court of Kansas, and, for that reason, the motion to dismiss or affirm should be sustained, and that errors assigned as first, second, sixth and seventh rest entirely upon the construction given by the Supreme Court to the statutes and constitution of the State of Kansas, and this court considers itself bound thereby, and such errors are not sufficient grounds to authorize a reversal of the case.

Errors assigned as three, four and five do not apply for the reason that the facts urged in support thereof, appearing upon the record, do not sustain the contention made, and it does not appear therefrom that the plaintiff in error was deprived of or denied any privilege or immunity to which he was entitled, and the only distinction made by the statutes of Kansas between the plaintiff in error and other persons of the same class and citizens of the State of Kansas is that of residence and non-residence and apply alike to all persons of the same class and are therefore not within the prohibition of Sec. 2 of Art. 4 or the Fourteenth Amendment of the constitution of the United States. It follows that if the case is retained and decided upon its merits, the decision of the Supreme Court of Kansas should be affirmed.

Respectfully submitted,

JACKSON & JACKSON,
Attorneys for Defendant in Error.

JAMES F. TUFTS,
HORACE M. JACKSON,
Of Counsel.

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Supreme Court of the United States.

No. 120.—October Term, 1902.

Reuben M. Manley, Executor of the estate of George Manley, deceased, Plaintiff in Error, *vs.* Anna O. Park, substituted for Richard A. Park, deceased.	In error to the Supreme Court of the State of Kansas.

[January 5, 1903.]

Richard A. Park was plaintiff in the original action, brought in the District Court of Atchison County, Kansas, against William H. Risk, executor of the estate of George Manley, deceased. It was alleged in the petition, in substance, that the decedent was at the time of his death the owner of stock of the par value of $27,500, in a Kansas corporation, known as the Kansas Trust & Banking Company; that said corporation, subsequent to the death of Manley, became indebted to plaintiff; that the corporation was insolvent and had no property from which such indebtedness could be realized; that the defendant, as executor of the estate of Manley, became seized and possessed of all the property of the decedent within the State of Kansas, including the shares of stock referred to, and, by reason of a contractual liability imposed on the stockholders of said corporation, defendant was liable to plaintiff for the indebtedness in question. There was filed with the petition an affidavit for attachment, because of the nonresidence of the defendant, and after the return of the summons an attachment was levied on certain real estate in Atchison County, Kansas, "as the property of said defendant William H. Risk, executor of the estate of George Manley, deceased." Publication of notice of the pendency of the action was made, as required by laws of Kansas. Within the time limited for answering the defendant appeared generally by filing a demurrer to the petition on the grounds of a want of jurisdiction over the person of the defendant and the subject of the action, because several causes of action were improperly joined, and because the petition did not state facts sufficient to constitute a cause of action. Thereafter, Reuben A. Manley, successor to William H. Risk, as executor and trustee of the estate of George Manley, deceased, was substituted as defendant in the stead of Risk. An answer was thereupon filed, in which most of the material averments of the petition were admitted, such as the ownership by George Manley in his lifetime of the stock in question; the execution of his last will and testament; its admission to

probate and the grant of letters testamentary to Risk and to his successor by a New Jersey orphans' court; that Risk and his successor "became seized and possessed of all the property of the late George Manley, deceased, lying and being situated in the State af Kansas," and that the substituted defendant (Reuben M. Manley) "became and is now a stockholder of the said, The Kansas Trust & Banking Company, and as such executor of said estate is the owner and holder of said shares of stock of said corporation, amounting to the sum of $27,500." Separate defenses were interposed to defeat recovery, such as that plaintiff had not reduced his claim against the Kansas corporation to judgment, that there was a defect of parties plaintiff, that a special fund created by the Kansas corporation for the payment of the indebtedness in question existed, and should first be exhausted, and that various actions were pending in which recovery was sought by judgment creditors of said Kansas corporation, upon the liability of defendant as a stockholder in said corporation.

Issue was joined by the filing of a reply, the cause was tried by the court, judgment for the amount claimed was rendered against the defendant, and the attached real estate was ordered sold. The cause was taken to the Supreme Court of Kansas, and that court dismissed the petition in error because of an informality in the proceedings and without passing on the merits. (61 Kan. 857.) After the mandate had been filed in the lower court separate motions were made on behalf of defendant, to set aside the judgment and to withdraw the order for the sale of the attached property. The same grounds were assigned in support of each motion, and the claim of the protection of the Constitution of the United States was embodied in the third ground, by the assertion that a statute of Kansas, upon which the judgment complained of was based, violated the first and second sections of the fourth article of and the provisions of the Fourteenth Amendment to the Constitution of the United States. The motions were overruled, and the "decision and judgment" was subsequently affirmed by the Supreme Court of Kansas. (62 Kan. 553.) By writ of error the cause was then brought to this court. The original defendant in error having died, Anna O. Park has been substituted as defendant in error.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

A motion has been made to dismiss the writ of error upon the ground that no Federal question is presented by the record, it being claimed that the decision and judgment of the Supreme Court of Kansas sought to be reviewed was based solely upon a consideration of local statutes and the determination of a question of general law, viz., the effect as *res judicata* of a judgment of a court of Kansas. But as the claim of the benefit of

the Constitution of the United States was specially made in the motions and was passed upon adversely to the moving party, it follows that a Federal question exists in this record, and the motion to dismiss is therefore overruled. (*Missouri, Kansas &c. Ry. Co.* v. *Elliott*, 184 U. S. 534.)

The specifications of error now relied upon are thus stated in the brief of counsel for plaintiff in error:

"First. Under the constitution and laws of the State of Kansas, an executor, resident in the State of Kansas, could be sued in a District Court of the State, but the property in his charge could not be attached, nor sold on execution.

"Second. Under the constitution and statutes of the State of Kansas, no authority exists for attaching the property in charge of a non-resident executor.

"Third. Section 203 of the executors' and administrators' act, (par. 2989, G. S. Kans. 1889,) as construed and upheld in this case, is in violation of sec. 2, art. 4, of the Constitution of the United States, in that it does not accord to the plaintiff in error and his predecessor, citizens of the State of New Jersey, all the privileges and immunities of an executor resident in the State of Kansas. (Sec. 2, art. 4, Const. U. S.)

"Fourth. Sec. 203 of the executors' and administrators' act, (par. 2989, G. S. Kans. 1889,) as construed and upheld in this case, is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges of the plaintiff in error and his predecessor, citizens of the United States, and their immunity from suit by attachment, and deprives them of their property without due process of law, and denies them the equal protection of the laws.

"Fifth. The right of the plaintiff in error, and his predecessor, citizens of the State of New Jersey, to act as executors of the estate of George Manley, deceased, is a privilege, and the exemption of an executor, not a resident in the State of Kansas, from suits by attachment, is an immunity which is guaranteed by sec. 2, art. 4, Constitution of the United States, and the same were denied by the decision of the Supreme Court of Kansas in this case."

The first and second propositions, it is manifest, simply invite a consideration of the constitution and laws of the State of Kansas; and, consequently, the construction adopted by the Supreme Court of Kansas of the pertinent provisions of such constitution and laws, is binding upon this court as a decision upon a matter of purely local law, not presenting a Federal question. We must accept then as undeniable the ruling of the highest court of Kansas, that under the constitution and statutes of Kansas real estate situated in that State, the title to which was vested in a non-resident executor, to whom letters testamentary had been issued by a court of another jurisdiction, might be attached and sold, in an action of debt against the non-resident executor.

The remaining propositions assail the validity, under the Constitution of the United States, of the statute of Kansas, (par. 2989, Gen. Stat. Kan.

1889; sec. 147, ch. 107, Gen. Stat. Kan. 1897,) as thus construed by th Supreme Court of Kansas. The section in question upon which the judg ment complained of was based is as follows:

"An executor or administrator duly appointed in any other State o county may sue or be sued in any court in this State, in his capacity o executor or administrator, in like manner and under like restrictions as non-resident may sue or be sued."

This section was held to authorize an attachment of property in an actio against a non-resident executor, precisely as in ordinary actions agains non-residents.

Now, the claimed nullity of the judgment assailed was based upo the alleged invalidity of the Kansas statute above quoted, as respected th Constitution of the United States, in this, that as an executor resident i Kansas possessed the privilege or immunity of not being subject to sui by attachment of property, a like privilege or immunity within the Stat of Kansas was vested by the Constitution of the United States in executor who were not residents of Kansas, and the refusal of the State of Kansa to accord such privilege or immunity to a non-resident executor and th subjecting him to the operation of attachment laws, deprived the foreig executor of his property without due process of law and denied him th equal protection of the laws. But, it is obvious, we think, under the cir cumstances disclosed in this record, that the protection of the Constitutio of the United States could not be successfully invoked to annul the judg ment here complained of, on the theory that such judgment was absolutel void and of no effect under the Constitution of the United States. Thi results from the consideration that no claim to the protection of the Con stitution of the United States was set up in any form in the proceedings had in the State court which resulted in the judgment complained of, and for such reason, if that judgment had been brought to this court for review it would have been its duty—having in mind the provisions of section 709 of the Revised Statutes—to affirm the judgment and recognize its binding force, because no Federal question was raised. A domestic judgment o a State court whose validity it would have been the duty of this court t uphold, on direct proceedings to obtain a reversal of such judgment manifestly should be treated by courts of the United States, so far as relates to Federal questions which existed at the time the action was com menced in which the judgment was rendered, as valid between the parties to such judgment. We could not hold to the contrary without saying that a Federal defense which could not be availed of unless raised before judgment was yet efficacious, although not raised, to avoid the judgment when rendered. This would necessarily declare a plain contradiction in terms. As the authority conferred by Kansas upon her courts was to set

aside *void* judgments, provisions of the Constitution of the United States which would have been available if pleaded or otherwise presented in the State courts as a defense in the proceedings in the original action to defeat the recovery of a valid judgment, cannot, when the opportunity has not been availed of and the judgment has become a finality, be resorted to as establishing that in fact the judgment possessed no binding force or efficacy whatever.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.